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# Revised Report of the Working Group on the Draft Statute for an International Criminal Court

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## Revised report of the Working Group on a draft statute for an international criminal court

### A. INTRODUCTION

1. Pursuant to the decision taken by the International Law Commission at its 2298th meeting on 17 May 1993 to reconvene the Working Group on a draft statute for an international criminal court, 1/ the Working Group 2/ held 22 meetings between 17 May and 16 July 1993. 3/

2. The mandate given by the Commission to the Working Group was in accordance with paragraphs 4, 5 and 6 of General Assembly resolution 47/33 of 25 November 1992. In those paragraphs, the General Assembly had taken note with appreciation of chapter II of the report of the International Law Commission (A/47/10), entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction; had invited States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction; and had requested the Commission to continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

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1/ The Commission, at its two thousand three hundredth session, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".

2/ The composition of the Working Group was as follows: Mr. Koroma (Chairman); Mr. Thiam, ex officio as Special Rapporteur on the topic: "Draft code of crimes against the peace and security of mankind"; Messrs Al-Baharna, Al Kasawneh, Arangio-Ruiz, Calero Rodrigues, Crawford, de Saram, Guney, Idris, Rao, Razafindralambo, Robinson, Rosenstock, Tomuschat, Vereshchetin, Villagran Kramer and Yankov.

3/ This number does not include the meetings held by the various subgroups referred to in paragraph 5 below.

3. In performing its mandate, the Working Group had before it the report of the Working Group on the question of an international criminal jurisdiction included in the Commission's report at its previous session (A/47/10, Annex); the eleventh report of the Special Rapporteur on the topic "Draft Code of Crimes against the Peace and Security of Mankind", Minister Doudou Thiam (A/CN.4/449 and Corr.1 English only); the comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction (document A/CN.4/452 and Add.1); chapter B of the topical summary of the discussion held in the Sixth Committee of the General Assembly during the forty-seventh session, prepared by the Secretariat (A/CN.4/446); the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (document S/25704) and a compilation prepared by the Secretariat of draft statutes for an international criminal court elaborated in the past either in the framework of United Nations organs or by other public or private entities.

4. During the initial meetings, the Group, working as a whole, examined a series of draft provisions dealing with the more general and organizational aspects of a draft statute for an international criminal court, judges, Registrar, composition of chambers, etc., reaching, in many instances, a preliminary understanding on many of the draft provisions or at least on the basis on which a provision on those subject-matters could be drafted.

5. Subsequently, and in order to expedite its work, the Working Group decided to create three subgroups dealing, respectively and primarily with the following subject-matters:

I. Jurisdiction and applicable law

II. Investigation and prosecution

III. Cooperation and judicial assistance.

At a later stage, new subject-matters, identified as pertaining within the statute for an international criminal court, were also distributed among the various subgroups.

6. Further to the discussion of the reports of the various subgroups, which contained draft provisions on the various subject-matters allocated to them, the Working Group produced a preliminary and consolidated draft text for a statute which was submitted for further examination by the Working Group.

7. The preliminary consolidated text elaborated by the Working Group is divided into seven main parts: Part 1 dealing with the establishment and composition of the court; Part 2 on jurisdiction and applicable law; Part 3 on

investigation and commencement of prosecution; Part 4 dealing with the trial; Part 5 on appeal and review; Part 6 on international cooperation and judicial assistance and Part 7 on enforcement of sentences.

8. Some of the provisions or part of some provisions are still between square brackets either because the Working Group could not yet find general agreement either on the contents of the proposed provision or on its formulation, or in order to receive guidance from the General Assembly.

9. In numerous instances, the commentaries to the draft articles explain the special difficulties which the Working Group has encountered in drafting a provision on a given subject-matter, the various views to which it gave rise or the reservations which it aroused.

10. The Working Group feels that the views of the General Assembly would be particularly welcome on the points referred to in the two preceding paragraphs and it proposes that the Commission so indicate in its report to the General Assembly.

11. In laying down the general orientation of the draft statute, the Working Group was guided by the recommendations of the Commission at its preceding session and the report of its Working Group 4/ but also took into account the views expressed thereon by Governments either in the Sixth Committee 5/ or in their written comments. 6/

12. The draft Statute prepared by the Working Group is called "Draft Statute for an International Criminal Tribunal" because, as explained in the commentary to article 5, the Working Group felt that the three organs contemplated in the draft, namely the "court" or judicial organ, the "Registry" or administrative organ and the "Procuracy" or prosecutorial organ had, for conceptual, logistical and other reasons, to be considered in the draft Statute as constituting an international judicial system as a whole.

13. Following is the draft statute for an international criminal court prepared by the Working Group. It is understood that this is a preliminary version thereof; the Working Group intends to return to it, and finalize work thereon if reconvened by the Commission, at the Commission's next session.

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4/ Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10), para. 104 and Annex.

5/ A/CN.4/446, Chapter B.

6/ A/CN.4/452 and Add.1.

## B. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL AND COMMENTARIES THERETO

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# DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL AND COMMENTARIES THERETO:

## PART 1: ESTABLISHMENT AND COMPOSITION OF THE TRIBUNAL

### Article 1

### Establishment of the Tribunal

There is established an International Criminal Tribunal (hereinafter the Tribunal), whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

### Article 2

### Relationship of the Tribunal to the United Nations

[The Tribunal shall be a judicial organ of the United Nations.]

[The Tribunal shall be linked with the United Nations as provided for in the present Statute.]

### Article 3

### Seat of the Tribunal

1. The seat of the Tribunal shall be established at ...

2. The [Tribunal] [Secretary-General of the United Nations] shall, with the approval of [the General Assembly], conclude an agreement with the State of the seat of the Tribunal, which will regulate the relationship between that State and the Tribunal.

### Article 4

### Status of the Tribunal

1. The Tribunal is a permanent institution open to States parties to the Statute of the Tribunal (hereinafter called the State Parties) and to other States in accordance with this Statute. It shall sit when required to consider a case submitted to it.

2. The Tribunal shall enjoy in the territory of each of the States parties such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

### Commentary

(1) Part 1 of the draft statute, dealing with the establishment and composition of the Tribunal, may be considered, according to their subject-matter, in several groupings.

(2) Articles 1 to 4 refer to aspects closely linked to the nature of the Tribunal and deal with its establishment (article 1), its relationship with the United Nations (article 2), its seat (article 3) and its status (article 4).

(3) The purpose of the establishment of the Tribunal, contemplated in article 1, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be otherwise less preferable.

(4) The brackets around the two paragraphs of article 2 reflect two divergent views expressed in the Working Group, also reflected in the plenary discussion, 7/ of what the relationship of the Tribunal to the United Nations should be. While some members were in favour of the Tribunal becoming an organ of the United Nations, others felt that this might require amendment to the United Nations Charter and advocated another kind of link with this Organization such as a treaty of cooperation along the lines of those between the United Nations and its specialized agencies, a separate treaty providing for the election of judges by the General Assembly, etc. It was generally believed that there would be advantage in at least some sort of a formal linking of the Tribunal with the United Nations, not only in the authority and permanence which the Tribunal would acquire thereby, but because a part of the Court's jurisdiction might depend upon decisions by the Security Council (see draft article 24). In this connection some members pointed out that such linkage might be conferred by the Tribunal's establishment as a subsidiary organ of the General Assembly, or in such other way as the United Nations might decide, and need not necessarily involve budgetary obligations for, or participation by, all Member States of the United Nations (see draft article 7 on election of judges).

(5) The bracketed portions of paragraph 2 of article 3 and the final language to be chosen are, of course, dependent on the solution to be adopted under article 2.

(6) For its part, paragraph 1 of article 4 reflects the virtues of flexibility and cost-reduction advocated by the report of the Working Group at the preceding session of the Commission. While the Tribunal is a permanent institution, it shall sit only when required to consider a case submitted to

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7/ See Report of the International Law Commission to the General Assembly on the work of its present session (A/48/10), supra, paras. _____ .

it (see article 36). Some members felt that the rule according to which the Tribunal shall sit only when required, was incompatible with the necessary permanence, stability and independence of a true international Criminal Tribunal.

Article 5

Organs of the Tribunal

The Tribunal shall consist of the following organs:

(a) The Court, which shall consist of 18 judges elected in accordance with article 7;

(b) The Registry, appointed under article 12;

(c) The Procuracy, as provided in article 13.

Commentary

(1) Article 5 lays down the overarching structure of the international judicial system to be created, which is called "Tribunal" and its component parts, namely, the "Court" or judicial organ, the "Registry" or administrative organ and the "Procuracy", or prosecutorial organ. It was felt in the Working Group that, for conceptual, logistical and other reasons, the three organs had to be considered in the draft statute as constituting an international judicial system as a whole, notwithstanding the necessary independence which has to exist, for ethical and fair trial reasons, between the judicial branch (court) and the prosecutorial branch (procuracy) of that system.

(2) The name "Tribunal" was chosen for designating the international judicial system as a whole because of its well-established credentials in international criminal law, even though in some national criminal systems it might bring connotations of a court of a lower level, which is not, at all, the meaning which the word is given in the present draft statute.

(3) Special care was taken in various articles through the draft statute to refer, as the case may be, to the Tribunal as a whole, or to the Court, in particular.

Article 6

Qualifications of judges

The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the

overall composition of the Court, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 7

Election of judges

1. The judges shall be elected by majority vote of the States parties to this Statute.

2. Each State party may nominate for election one person who possesses the qualifications specified in article 6, and who is willing and able to serve as may be required on the Court.

3. The election of judges shall be by secret ballot.

4. No two judges may be nationals of the same State.

5. States parties should strive to elect persons representing diverse backgrounds and experience, with due regard to representation of the major legal systems.

6. Judges hold office for a term of 12 years and are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, 6 judges chosen by lot shall serve for a term of 4 years and are eligible for re-election; 6 judges (chosen by lot) shall serve for a term of 8 years, and the remainder shall serve a term of 12 years.

Article 8

Judicial vacancies

1. In the event of a vacancy, a replacement judge may be elected in accordance with article 7.

2. Judges elected to fill a vacancy shall serve for the remainder of their predecessor's term, and if that period is less than four years, are eligible for re-election for a further term.

Article 9

Independence of judges

In their capacity as members of the Court, the judges shall be independent. Judges shall not engage in any activity which interferes with their judicial functions, or which is likely to affect confidence in their independence. In case of doubt, the Court shall decide.

Article 10

Election and functions of President and Vice-Presidents

1. The President, as well as the first and second Vice-Presidents, shall be elected by the absolute majority of the judges.

2. The President and the Vice-Presidents shall serve for a term of three years or until the end of their term of office on the Court, whichever is earlier.

3. The President and the Vice-Presidents shall constitute the Bureau which, subject to this Statute and the Rules, shall be responsible for the due administration of the Court, and other functions assigned to it under the Statute.

4. The first or second Vice-President, as the case may be, may act in place of the President on any occasion where the President is unavailable or ineligible to act.

Article 11

Disqualification of judges

1. Judges shall not participate in any case in which they have previously been involved in any capacity whatsoever, or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

2. A judge who feels disqualified under paragraph (1) or for any other reason in relation to a case shall so inform the President.

3. The accused may also request the disqualification of a judge under paragraph 1.

4. Any question concerning the disqualification of a judge shall be settled by a decision of the absolute majority of the chamber concerned. The chamber shall be supplemented for that purpose by the President and the two Vice-Presidents of the Court. The challenged judge shall not take part in the decision.

Commentary

(1) Articles 6 to 11 deal with the first of the three organs making up the international criminal judicial system to be established, namely the Court. They deal with its composition and the way to achieve it as well as with the status of the judges and the Court's Bureau and cover, in particular, the qualifications of judges (article 6); the election of judges (article 7), judicial vacancies (article 8), the independence of judges (article 9), the election of the Court's President and Vice-Presidents (article 10) and the disqualification of judges (article 10).

(2) As regards article 7, providing for the election of judges by majority vote of the States parties to the Statute it was made clear in the Working Group that, under paragraph 2, a State party could nominate a national of another State party. Article 7 originally contained in its paragraph 3 some terminology between brackets to the effect that the election would be conducted by [the Secretary-General of the United Nations] in accordance with a procedure laid down by the [General Assembly]. Given the lack of definition at this stage and as explained in the commentary to article 2 of the kind of link that the Court will have with the United Nations, the Working Group decided to delete those phrases.

(3) As to the relatively long period of 12 years for the term of office of the judges provided for in paragraph 6 of article 7, it was agreed in the Working Group that this should be considered as a sort of trade-off for the prohibition of their re-election. It was felt that, unlike judges of the International Court of Justice, the special nature of an international criminal institution advocated in favour of the non-re-election principle. The only exceptions are contained in paragraph 7 and article 8 (2) on judicial vacancies.

(4) In drafting article 9 on independence of the judges, the Working Group took into account on the one hand the desirability that such an independence be effectively ensured and, on the other hand, the fact that the projected court is not a full-time body and therefore, in accordance with article 17, judges are not paid a salary but only a daily allowance and expenses related to the performance of their functions. This is why article 9, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in article 17 (3)), also endeavoured to define the criteria concerning activities which might compromise the independence of the judges and from the exercise of which the latter should abstain. For instance, it was clearly understood that a judge of the court could not be, at the same time, a member or official of the Executive Branch of Government. In case of doubt, the Court shall decide.

(5) Article 10 on election and functions of the President and the Vice-Presidents of the Court is important because they compose the Court's Bureau which is given specific functions under the draft statute. Some members of the Working Group argued strongly that the Court should have a full-time President, who would reside at the seat of the Court and be

responsible under the Statute for its judicial functioning. Others stressed the need for flexibility, and the character of the Court as a body which would only be convened as necessary: in their view a requirement that the President be full-time might unnecessarily restrict the range of candidates for the position. It was agreed that the provision would not prevent the President becoming full-time if circumstances required it. The question concerning the possibility of election by postal ballot was discussed in the Working Group and not ruled out, but it was felt that this was a matter for the internal rules of court to decide. Some members also suggested that the internal rules of court could address the matter of possible alternates for the President and Vice-Presidents.

(6) Article 11 on disqualification of judges contains, in its paragraph 1, the general grounds which should lead to the disqualification of a judge in any given case. It was understood in the Working Group that the words "in any case in which they have previously been involved in any capacity whatsoever" covered also the judge's participation in the same case as Prosecutor or defence lawyer. Paragraphs 2 and 3 of the draft article deal with who may initiate the disqualification process, namely the judge himself (para. 2) or the accused (para. 3). The decision, according to paragraph 4, always rests with the chamber concerned, which would be supplemented for that purpose by the President and the two Vice-Presidents of the Court. There was also some discussion in the Working Group on whether a limit should be placed on the number of judges whose disqualification an accused could request, and on whether the same quorum should be required for disqualifications under paragraph 1 or "for any other reason" under paragraph 2. The Working Group would welcome comments of the General Assembly on both points.

Article 12

Election and functions of Registrar

1. On the proposal of the Bureau the judges of the Court by an absolute majority shall elect the Registrar, by secret ballot, who shall be the principal administrative officer of the Court.

2. The Registrar shall be

(a) elected for a seven-year term, and eligible for re-election;

(b) shall be available on a full-time basis, but may with the permission of the Bureau exercise such other functions within the United Nations system as are not inconsistent with his office as Registrar.

3. The Bureau may appoint or authorize the appointment of such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar, so far as possible in conformity with the United Nations Staff Regulations and Staff Rules and approved by the Court.

Article 13

Composition, functions and powers of the Procuracy

1. The Procuracy shall be composed of a Prosecutor, who shall be Head of the Procuracy, a Deputy Prosecutor and such other qualified staff as may be required.

2. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. They shall be elected by a majority vote of the States parties to this Statute from among candidates nominated by the States parties thereto for a term of five years and be eligible for re-election.

3. The States parties shall, unless otherwise decided, elect the Prosecutor or Deputy Prosecutor on a standby basis.

4. The Procuracy, as a separate organ of the Tribunal, shall act independently, and shall not seek or receive instructions from any Government or any source.

5. The Prosecutor shall appoint such staff as are necessary to carry out the responsibilities of the office.

6. The Prosecutor, upon receipt of a complaint pursuant to article 28, shall be responsible for the investigation of the crime alleged to have been committed and the prosecution of the accused for crimes referred to in articles 22 and 26.

7. The Prosecutor shall not act in relation to a complaint involving a person of the same nationality. In any case where the Prosecutor is unavailable or disqualified, the Deputy Prosecutor shall act as Prosecutor.

Commentary

(1) Article 12 on election and functions of the Registrar and article 13 on the Composition, functions and powers of the Procuracy deal with the two other organs which compose the international judicial system to be established.

(2) The Registrar, who is elected by the Court, is the principal administrative officer of the Court and is, unlike the judges, eligible for re-election. He performs important functions under the Statute such as notifications, reception of declarations of the Court's jurisdiction, etc. Article 12 regulates not only the election of the Registrar but also the appointment of the Registry staff and the rules which apply to the latter.

(3) As to the Procuracy, provided for in article 13 and composed of the Prosecutor, a Deputy Prosecutor and such other qualified staff as may be required, great emphasis has been placed in the Working Group in the sense that, although being an organ pertaining to the global international judicial system to be created, it should be independent in the performing of its functions and it should be separate from the Court's structure. This is why the article proposes that the election of the Prosecutor and Deputy Prosecutor be carried out not by the Court but by a majority of States parties to the Statute. It should however be noted that paragraph 4 also provides that the Prosecutor shall not seek to receive instructions from any Government or any source, as it acts, really, as a representative of the whole international community.

(4) An earlier version of paragraph 5 contained the words [in consultation with the Bureau] between brackets, in connection with the appointment by the Prosecutor of the staff of the Procuracy. They were deleted because the Working Group felt that the need to consult with the Court' Bureau for appointing the Registry's staff might compromise the Prosecutor's independence. Some members, however, were of the view that the functions of the Court and those of the Procuracy should be related.

(5) Paragraph 6 spells out the main functions of the Prosecutor, namely the investigation of the crime and the prosecution of the accused. Paragraph 7, however, in keeping with the preoccupation of the Working Group to preserve the Prosecutor's independence, provides that the Prosecutor shall not act in relation to complaint involving a person of his/her nationality.

Article 14

Solemn undertaking

Before first commencing to exercise their functions under this Statute, members of the Tribunal shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 15

Loss of office

1. Judges shall not be deprived of their office unless, in the opinion of two thirds of judges of the court, they have been found guilty of proven misconduct or a serious breach of this Statute.

2. Where the Prosecutor, the Deputy Prosecutor or the Registrar is found in the opinion of two thirds of the court, guilty of proved misconduct or in serious breach of this Statute, he or she shall be removed from office.

Article 16

Privileges and immunities

1. Judges shall enjoy, while performing their functions in the territory of States parties, the same privileges and immunities as those accorded to judges of the International Court of Justice.

2. Counsel, experts and witnesses shall enjoy, while performing their functions in the territory of States parties, the same privileges and immunities as those accorded to counsel, experts and witnesses involved in proceedings before the International Court of Justice.

3. The Registrar, the Prosecutor, the Deputy Prosecutor and other officers and staff of the Tribunal shall enjoy, while performing their functions in the territory of the States parties the privileges and immunities necessary to the performance of their functions.

4. The judges may, by a majority revoke the immunity of any person referred to in paragraph 3 other than the Prosecutor. In the case of officers and staff of the Tribunal, they may do so only on the recommendation of the Registrar or Prosecutor, as the case may be.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.

2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. The judges shall receive a daily allowance during the period in which they exercise their functions, and shall be paid for the expenses related to the performance of their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 9.

Article 18

Working languages

The working languages of the Tribunal shall be English and French.

Commentary

(1) Articles 14 to 18 deal with aspects related to the beginning and end of the judges' functions, and to the work of the judges and the court and the performing of their functions. They deal with solemn undertaking (article 14), loss of office (article 15), privileges and immunities (article 16), allowances and expenses (article 17) and working languages (article 18).

(2) Article 15 on loss of office contains, in both its paragraphs, essentially the same provision for Judges, the Prosecutor, the Deputy Prosecutor or the Registrar, namely:

(a) removal from office due to proven misconduct; or breach of the Statute, in cases in which

(b) a decision to that effect is taken by two thirds of the judges. Some members observed that this provision differed from the corresponding article of the Statute of the International Court of Justice (article 18) which, in the case of a judge only accepted dismissal if, in the unanimous opinion of the other members of the court, he had ceased to fulfil the required conditions. One member, in particular, found it strange that the Prosecutor could be removed by an organ different from that which had elected him, and thought that this might compromise his independence before the court.

(3) Article 16 refers to the privileges and immunities of judges, counsel, experts and witnesses as well as the Registrar, the Prosecutor, Deputy Prosecutor and other officers and staff of the Tribunal, while performing their functions in the territory of States parties to the court's statute. For the purposes of privileges and immunities, judges of the court are equated by article 16 to judges of the International Court of Justice, which according to article 19 of the Court's statute enjoy diplomatic privileges and immunities when engaged on the business of the Court. An equation with the International Court of Justice is also made in the case of counsel, experts and witnesses. In this connection, article 42 (3) of the Statute of the International Court of Justice states that the agents, counsel and advocates of parties before the court shall enjoy the privileges and immunities necessary to the independent exercise of their duties. The

functional criterion is also used in paragraph 3 of draft article 16 for the privileges and immunities of the Registrar, the Prosecutor and other officers and staff of the tribunal, even though those privileges and immunities may be revoked by a majority of the judges on the recommendation of the Registrar or Prosecutor, as the case may be. To ensure his independence, the immunities and privileges of the Prosecutor cannot be revoked.

(4) Article 17 on allowances and expenses reflects the fact that, while the proposed court would not be a full-time body, its President, as explained in the commentary to article 10, may become full time, if circumstances require it. Hence the distinction between the daily or special allowance proposed for the judges and the vice-presidents and the annual allowance proposed for the President.

(5) Article 18 which makes English and French the working languages of the Tribunal should be read in conjunction with articles 38 and 43 1 (f) and 2.

Article 19

Rules of the Tribunal

1. The Court may by a majority of the judges and on the recommendation of the Bureau, make rules for the functioning of the Tribunal under this Statute, including rules regulating:

(a) the conduct of pre-trial investigations, in particular so as to ensure that the rights referred to in articles 38 to 44 are not infringed;

(b) the procedure to be followed and the rules of evidence to be applied in any trial;

(c) any other matter which is necessary for the implementation of this Statute.

2. Rules of the Tribunal shall forthwith be notified to all States parties, and shall be published.

Article 20

Internal rules of the court

Subject to this Statute and to the Rules of the Tribunal, the court has the power to determine its own rules and procedures.

Commentary

(1) Both articles 19 and 20 deal with the making of rules. Article 19 refers to rules of the Tribunal relating to pre-trial investigations and the conduct

of the public trial itself, and it involves matters concerning the respect of the rights of the accused, procedure, evidence, etc. Article 20, on the other hand, refers to rules necessary for the internal functioning of the court, such as methods of work, ways to conduct the Court's internal sessions, etc.

(2) Great emphasis was placed by some members in the distinction between both kinds of rules and this position predominated in the Working Group. Some members, however, were unconvinced about the existence of a substantive difference between both kinds of rules.

(3) In connection with paragraph 1 (b) of article 19, one member felt that the matter concerning the adoption of rules of evidence was too complex and involved enactment of substantive law. Therefore, it should, in principle, not be part of the Tribunal's competence. It was also observed by one member that a provision should be added to the article to the effect that in cases not covered by the Rules on procedure and evidence adopted by the Tribunal, the Tribunal should apply customary standards in this area. Some members felt that paragraph 1 (b) was intended to cover the most fundamental rules and general principles concerning procedure and evidence.

(4) It was understood that article 20 also covered the power of each chamber to elaborate some procedures.

Article 21

Review of the Statute

A Review Conference shall be held, at the request of at least [...] States parties after this Statute has been in force for at least five years:

(a) to review the operation of this Statute;

(b) to consider possible revisions or additions to the list of crimes contained in article 22 by way of a Protocol to this statute or other appropriate instrument and in particular, the addition to that list of the Code of Crimes against the Peace and Security of Mankind, if it has then been concluded and has entered into force.

Commentary

The place of article 21 on "Review of the Statute" is still provisional. The article could be part of the final clauses of the statute.

Subparagraph (b) of the draft article is especially related to Section 2 on the Jurisdiction and applicable law as it would provide the basis for enlarging the strand of jurisdiction contained in article 22 (see following

paragraphs) incorporating new conventions into its scope, including the draft code of crimes against the Peace and Security of Mankind.

PART 2: JURISDICTION AND APPLICABLE LAW

Article 22

List of crimes defined by treaties

The Court may have jurisdiction conferred on it in respect of the following crimes:

(a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;

(b) grave breaches of:

(i) The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by article 50 of that Convention;

(ii) The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by article 51 of that Convention;

(iii) The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by article 130 of that Convention;

(iv) The Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by article 147 of that Convention;

(v) Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June 1977, as defined by article 85 of that Protocol;

(c) the unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970;

(d) the crimes defined by article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;

(e) apartheid and related crimes as defined by article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973;

(f) the crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973;

(g) hostage-taking and related crimes as defined by article 1 of the International Convention against the Taking of Hostages of 17 December 1979;

(h) the crimes defined by article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10 May 1988.

Commentary

(1) Part 2 of the draft Statute, dealing with jurisdiction and applicable law, is the central core of the draft statute. From the point of view of the crimes which may give rise to the court's jurisdiction, articles 22 to 26 lay down, basically, two strands of jurisdiction, which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaties is the International Convention against the taking of Hostages of 17 December 1979. Examples of the second category of treaties are the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft (14 September 1963) as well as all treaties dealing with the combating of drug-related crimes, including the 1988 United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988).

(2) Articles 22, 23 and 24 are devoted to the first strand of jurisdiction mentioned above. The crimes and the treaties concerned under this strand of jurisdiction are listed in article 22. In the view of the Working Group, the two main criteria which led to considering the crimes contemplated in the treaties listed in article 22 as crimes under international law were (a) the fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty and (b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility that an international criminal tribunal try the crime, or both.

(3) Subparagraph (b) of article 22 does not include the 1977 Protocol II of the 1949 Geneva Conventions on Humanitarian Law because this protocol contains no provision concerning grave breaches.

(4) Article 22 does not list the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 because this Convention is not yet in force. If the Convention came into force before the Statute is adopted, consideration could be given to adding the Convention to the list. The following wording would be appropriate:

(i) crimes related to mercenaries as defined by articles 2, 3 and 4 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989.

(5) As to drug-related crimes, including the crimes referred to in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, for the reasons expressed under (1) and (2) above, they have not been listed in article 22, even though the international criminal court may acquire jurisdiction in their respect under the other strand of jurisdiction contemplated in article 26 (2) (b).

(6) Some members, for the reasons explained in the commentary to article 26, felt that the crimes dealt with in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met all the characteristics to be included in the list of article 22. Some members also felt that the crime of torture as contemplated in the Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, also qualified for inclusion in that list.

## Article 23

## Acceptance by States of jurisdiction over crimes listed in article 22

### Alternative A

1. A State party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over one or more of the crimes referred to in article 22.

2. A declaration made under paragraph (1) may be limited to:

(a) particular conduct alleged to constitute a crime referred to in article 22 or

(b) conduct committed during a particular period of time, or may be of general application.

3. A declaration may be made under paragraph (1) for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case six months' notice of withdrawal must be given to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. A State not a party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

Alternative B

1. Unless it makes the declaration provided for in paragraph 2, a State becoming party to this Statute is deemed to have accepted the jurisdiction of the Court over any crime referred to in article 22, if it is a party to the treaty which defines that crime.

2. A State party to the present Statute may, by declaration lodged with the Registrar, indicate that it does not accept the jurisdiction of the Court over one or more of the crimes referred to in paragraph 1.

3. The declaration may be made on the ratification of or accession to the Treaty embodying this Statute or at any time thereafter, in which case it shall come into effect 90 days after being made and it shall not affect any proceedings already commenced under this Statute.

4. Declarations may be withdrawn at any time, with immediate effect.

Alternative C

1. A State party to this Statute may, by declaration lodged with the Registry, at any time accept the jurisdiction of the Court.

2. Unless otherwise specified, a declaration of acceptance under paragraph 1 shall be deemed to confer jurisdiction on the court with regard to all of the crimes listed in article 22.

3. A declaration of acceptance under paragraph (1) may be limited to: (the rest of the provision as in paragraphs 2, 3 and 4 of Alternative A).

Commentary

(1) Article 23 deals with the ways and modalities in which States may accept the court's jurisdiction over crimes listed in article 22.

(2) The system set out in Alternative A could be characterized as an "opting in" system whereby jurisdiction over certain crimes is not conferred automatically on the court by the sole fact of becoming a part to the Statute but, in addition, a special declaration is needed to that effect. Some

members were of the view that this approach was the one which best reflected the consensual basis of the court's jurisdiction and best translated into a formulation the flexible approach to the Court's jurisdiction which characterized the recommendations of the Working Group at the Commission's previous session.

(3) In this connection, paragraphs 1, 2 and 3 of Alternative A deal with acceptance by State parties to the court's statute and to the respective treaties concerned. Paragraph 1 provides for the possibility of a general declaration very much along the lines of the optional clause contained in article 36 of the Statute of the International Court of Justice. Such declaration, according to paragraph 2, may be general or subject to certain limitations ratione materiae or ratione temporis. In the latter case, however, paragraph 3 provides for certain restrictions inspired by the principle of good faith. For its part, paragraph 4 of Alternative A deals with the possible acceptance of the court's jurisdiction over the crimes referred to in article 22, by States parties to the respective treaties concerned which are not parties to the Court's Statute.

(4) Some other members did not believe that the consensual basis of the court's jurisdiction or the recommendations of the Working Group at the Commission's previous session necessarily led to a system like the one laid down in Alternative A. They preferred an approach which, in their view, rendered more meaningful the status of being a party to the Court's Statute. They advocated a system whereby a State, by becoming party to the Court's Statute, would automatically confer jurisdiction to the Court over the crimes listed in article 22, although they would have the right to exclude some crimes from such jurisdiction (opting out system). Alternatives B and C are possible formulations discussed in the Working Group based on this other approach to the court's jurisdicton.

(5) The Working Group presents these alternatives to the Commission, recommending that they be transmitted to the General Assembly in order to obtain some guidance as to the system to be adopted.

Article 24

Jurisdiction of the Court in relation to article 22

1. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22 provided that its jurisdiction has been accepted under article 23:

(a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts,

(b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948.

2. If the suspect is present on the territory of the State of his nationality or of the State where the alleged offence was committed, the acceptance of the jurisdiction of the Court by that State is also required.

Commentary

(1) Article 24 spells out the States which have to accept the court's jurisdiction in a given case under article 22 for the Court to have jurisdiction, in other words, which States have to consent.

(2) The general criterion recommended by the Working Group which is laid down in paragraph 1 (a) of the article is that the court has jurisdiction over a certain crime provided that any State which would normally have jurisdiction under the relevant treaty to try the suspect of that crime before its own courts, has accepted the court's jurisdiction under article 23. This paragraph should be read in conjunction with article 63 on surrender of an accused person to the Tribunal, in particular its paragraph 3, and the commentary thereto.

(3) A special mention is made of the Genocide Convention in paragraph 1 (h) because unlike other treaties listed in article 22, the Genocide Convention is not based on the principle "aut dedere aut judicare" but on the principle of territoriality. Article VI of said Convention provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent tribunal of the State in the territory of which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides that the above-mentioned persons could also be tried by such international penal tribunal as may have jurisdiction with respect to those contracting Parties which shall have accepted its jurisdiction. This can be read as an authority by States parties to it who are also parties to the Statute to allow an international criminal court to exercise jurisdiction over an accused who has

been transferred to the Court by any State. The travaux of article VI support that interpretation. 8/

(4) The consent of the State which, having jurisdiction under the relevant treaty to try the suspect for that crime under its own courts, prefers nevertheless to initiate proceedings before the court, does not suffice for the court to have jurisdiction, only in the case in which the accused, not being in the territory of that State is, instead, present either on the territory of the suspect's State of nationality or on the territory of the State where the alleged crime was committed. In such a case, for the court to have jurisdiction, the consent of one or the other of those two States, as the case may be, is also necessary.

Article 25

Cases referred to the Court by the Security Council

Subject to article 27, the Court also has jurisdiction under this Statute over cases referred to in Articles 22 or 26 (2) (a) which may be submitted to it on the authority of the Security Council.

Commentary

(1) Article 25, as clearly arises from its text, does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which may give rise to the court's jurisdiction. It, rather, broadens the category of subjects which may bring to the court the crimes referred to in articles 22 and 26 (2) (a), by providing the Security Council of the United Nations also with this right. The Working Group felt that a provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc.

(2) Some members expressed concern that article 25 might imply conferring on the Security Council a power which, in their view, it should not normally have, namely that of identifying specific persons as suspects of a crime of aggression and bringing specific charges against them. In this connection, it was understood in the Working Group that the Security Council would not normally be expected to refer a "case" in the sense of a complaint against named individuals, but would more usually refer to the Tribunal a situation of

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8/ See Report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (ECOSOC Official Record 3rd year 7th session Supp. No. 6 (E/794, 1948) 11-12).

aggression, leaving it to the Tribunal's own Prosecutor to investigate and indict named individuals.

(3) Some members were of the view that the power to refer cases to the Court under article 25 should also be conferred to the General Assembly, particularly in cases in which the Council might be hampered in its actions by the veto.

## Article 26

### Special acceptance of jurisdiction by States in cases not covered by Article 22

1. The Court also has jurisdiction under this Statute in respect of other international crimes not covered by Article 22 where the State or States identified in paragraph (3) notify the Registrar in writing that they specially consent to the Court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons.

2. The other international crimes referred to in paragraph (1) are:

(a) a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals;

(b) crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, aimed at the suppression of such crimes and which having regard to the terms of the treaty constitute exceptionally serious crimes.

3. The State or States referred to in paragraph (1) are:

(a) in relation to a crime referred to in paragraph (2) (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred;

(b) in relation to a crime referred to in paragraph (2) (b), the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

### Commentary

(1) Article 26 lays down the second strand of jurisdiction referred to at the beginning of section 2 of the present draft statute, in the commentary to article 22 above. It allows States concerned to confer jurisdiction on the court in respect of other international crimes not covered by article 22 when

they specially consent to the court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons. The two categories of crimes envisaged by this article are contemplated in its paragraph 2.

(2) Paragraph 2 (a) refers to "crimes under general international law" and defines this category, probably for the first time in connection with individual responsibility, as "crimes under a norm of international law accepted and recognized by the international community of States as a whole as being of such fundamental character that its violation gives rise to the criminal responsibility of individuals". This paragraph is intended to cover international crimes which have their basis in customary international law and which would otherwise not fall within the court's jurisdiction ratione materiae such as aggression, which is not defined by treaty, genocide, in the case of States not parties to the Genocide Convention, or other crimes against humanity not covered by the 1949 Geneva Conventions. It seemed inconceivable to the Working Group that, at the present stage of development of international law, the international community would move to create an international criminal court without including crimes such as those mentioned above, under the court's jurisdiction.

(3) It is to be noted in this connection that the report of the Secretary-General relating to the establishment of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law commmitted in the territory of the former Yugoslavia (document S/25704), which was approved by resolution 827/93 of the Security Council, considers the following instruments as conventional international law which has beyond doubt become part of customary international law: the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

(4) Some members, however, expressed reservations on paragraph 2 (a). A possible alternative, which attracted some support in the Working Group, would be to delete paragraph 2 (a) and to cover the problem by Article 25, that is to say by allowing such crimes to be referred to the Court by the Security Council. In the case of the crime of aggression, this would be a

solution which took account of the fact that a determination of aggression by a State, which would be a pre-condition to individual responsibility of those engaged in the planning or waging of a war of aggression, would in any event rest with the Security Council. Moreover, this would not be inconsistent with the Nuremberg Judgment, which considered crimes against humanity only to the extent that such crimes were linked to crimes against the peace (aggression) or war crimes proper. If this solution were adopted Article 25 would have to read "over cases of the kind referred to in Articles 22 or 26, or over crimes under general international law, which may be submitted ...".

(5) The other category of crimes contemplated by article 26 is contained in paragraph 2 (b) and is related to the distinction referred to in paragraphs 1 and 2 of the commentary to article 22, between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. The latter category is defined by the paragraph as "crime under national law ... which give effect to a provision of a multilateral treaty ... aimed at the suppression of such crimes, and which having regard to the terms of the treaty constitute an exceptionally serious crime".

(6) Given the process whereby the question of the possible creation of an international criminal court was sent by the General Assembly to the International Law Commission, the Working Group believes it is especially important to note that this is the provision through which the international criminal court could acquire jurisdiction to deal with drug-related crimes, and this is also why such crimes as well as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, receive special mention in the paragraph. It is also to be noted, however, that in order to prevent the court from being overwhelmed with minor cases, the subparagraph has placed a limit, by restraining the category to crimes which "having regard to the terms of the treaty constitute(s) an exceptionally serious crime".

(7) Some members of the Working Group expressed serious reservations with regard to this approach which included drug-related crimes in a separate strand of jurisdiction from those crimes contemplated by article 22. In his view, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988, could be equated to the

Conventions listed in article 22 of the draft Statute under any of the following criteria: (a) The constitution of the offence as a crime under international law; (b) the provisions designed to make the offence punishable under internal law; (c) provisions concerning jurisdiction over the crime by States other than those in whose territory the crime was committed; (d) provisions requiring prosecution and trial of the offender present in the State's territory if the latter decides not to extradite (aut dedere aut judicare) and (e) provisions concerning extradition and mutual legal assistance. In view of the foregoing, this member advocated in favour of the inclusion of the above-mentioned 1988 Convention in the list contained in article 22. Other members disagreed mainly on two grounds: (a) drug-related crimes referred to in the 1988 Convention were not sufficiently defined in the Convention for them to constitute a basic treaty law to be applied directly by the Court without reference to national law, and (b) the obligation to try or extradite provided for in the 1988 Convention would function not simply on the basis of the sole operation of the Treaty provisions but only between parties which would have made crimes referred to in the Convention punishable under their internal laws.

(8) As to the consent of which State or States is required for the jurisdiction of the court to be effective under article 26, two different criteria have been recommended by the Working Group. For crimes under national law which give effect to a provision of a multilateral treaty aimed at the suppression of such crimes, the criterion recommended is that the only consent required for the court to have jurisdiction is that of the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

(9) More restrictive is the criterion recommended as regards crimes under general international law. In this case, the Working Group recommends that both the consent of the State on whose territory the suspect is present and that of the State on whose territory the act or omission in question occurred be required, for the court to have jurisdiction.

## Article 27

## Charges of aggression

A person may not be charged with a crime of or directly related to an act of aggression under articles 25 or 26 (2) (a) unless the Security

Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge.

Commentary

Article 27

(1) Article 27 sets out the relationship between the Security Council and the proposed international criminal court. The Working Group was of the view that, if an act of aggression occurs, the responsibility of an individual would pre-suppose that some State had been held to be guilty of aggression, and such a finding would be for the Security Council to make. The consequential issues of whether an individual could be indicted, as having acted on behalf of that State and in such a capacity as to have played a part in the planning and waging of the aggression would be for the Court to decide.

(2) In an earlier version of the draft statute, the present article constituted a second paragraph to article 25. The Working Group decided to transform that paragraph into an independent article to be placed after article 26, in order to show clearly that the proposed relationship between the Security Council and the Court, if an act of aggression occurs, would apply not only in prosecutions under article 25 (at the initiative of the Security Council) but also in prosecutions under article 26 (2) (a) in which charges of aggression against a person might conceivably be brought by a State.

Article 28

Applicable law

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the rules and principles of general international law;

(c) as a subsidiary source, any applicable rule of national law.

Commentary

(1) The first two sources of applicable law mentioned by the draft article are this Statute and applicable treaties. It is understood that, in cases of court's jurisdiction on the basis of article 22, the indictment will specify the charges brought against the accused by reference to particular treaty provisions, which will, subject to the Statute, be the basic elements in any prosecution.

(2) The mention of the rules and principles of general international law is particularly relevant in the light of paragraph 2 (a) of article 26. Furthermore, it is also understood that the expression "rules and principles of general international law" include "general principles of law", so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.

(3) The mention in the draft article of "any applicable rule of national law" also acquires special importance in the light of paragraph 2 (2) of article 26.

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# Revised Report of the Working Group on the Draft Statute for an International Criminal Court

## Addendum

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B. DRAFT STATUTE FOR AN INTERNATIONAL TRIBUNAL AND COMMENTARIES THERETO (continued) . . . . . 2

GE.93-61689 (E)

## PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

### Article 29

### Complaint

Any State Party with jurisdiction over a particular crime under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to article 23 of the Statute with respect to the crime or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23; or the Security Council pursuant to article 25; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.

### Commentary

(1) The International Criminal Tribunal is envisaged as a facility that would be available to States Parties to its Statute, other States and the Security Council. The complaint is the mechanism that would invoke this facility and initiate the preliminary phase of the criminal procedure. Such a complaint may be filed by any State which has jurisdiction over the crime and has accepted the jurisdiction of the Court with respect to that crime. To meet the first requirement, the State must have jurisdiction over the crime under a treaty listed in article 22 to which it is a party, under customary law, or under its national law. To meet the second requirement, the State must also have accepted the jurisdiction of the Court with respect to the crime either as a State Party to the Statute or as a State not a party thereto, in accordance with article 23.

(2) The Working Group considered limiting resort to the Tribunal to States Parties to the Statute to encourage States to accept the rights and obligations provided for therein and to share in the financial burden relating to the operating costs of the Tribunal, a matter which has yet to be worked out. In some respects, this approach seemed appropriate for a tribunal established by means of a treaty. However, the Working Group felt that the interests of the international community in providing a universal mechanism for prosecuting, punishing and deterring international crimes wherever they occur weighed in favour of making this particular treaty institution available to all States in accordance with the provisions of this article.

(3) In the light of the primary responsibility of the Security Council for the maintenance of international peace and security under the United Nations

Charter, the Council would also be entitled to invoke the Tribunal and initiate criminal proceedings with respect to international crimes under conventional or customary law, in accordance with the functions and powers conferred on the Council by the Charter. While recognizing the circumstances which led the Security Council to establish an ad hoc tribunal to prosecute persons for crimes committed in the former Yugoslavia, the Working Group believed that it would be preferable for the Security Council to be able to refer such matters to an existing institution.

(4) One member suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the Court may otherwise not be duly investigated. However, other members felt that the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the backing of a State or the Security Council, at least not at the present stage of development of the international legal system.

(5) The complaint, which is to be submitted to the Registrar, is intended to bring to the attention of the Tribunal the apparent commission of a crime within its jurisdiction. The complaint must be accompanied by supporting documentation for the following reasons. First, the Tribunal is envisaged as a mechanism that should be available whenever necessary, but which should not be activated unless there is reason to do so. Given the personnel required and the costs involved in a criminal prosecution, the institution should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Second, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint should establish a prima facie case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime has apparently been committed and to provide a starting point for the investigation.

(6) During the investigation and pretrial phase, the Bureau of the Court would perform various judicial functions, in addition to its administrative functions, that it might otherwise assign to a Chamber of the Court depending on the number of cases referred to the Tribunal. The Tribunal was envisaged as a permanent institution which would only function when called upon to do so in a particular case. Depending on the caseload, it may be necessary for the Bureau to convene one or more Chambers to perform functions relating to

investigations and pretrial proceedings, such as those relating to requests for arrest warrants or orders as well as reviewing indictments. This may be required to ensure timely consideration of requests by the Prosecutor for orders essential to conducting investigations and prosecutions as well as to ensure the right of the accused to be tried without undue delay once the indictment has been confirmed. One member also suggested the possibility of establishing an Indictment Chamber consisting of 3 judges, assuming that the number of complaints referred to the Tribunal justified the establishment of such a Chamber.

Article 30

Investigation and preparation of the indictment

1. The Prosecutor shall, upon receipt of a complaint in accordance with article 29 and unless the Prosecutor determines that no possible basis exists for action by the Court, initiate investigations. The Prosecutor shall assess the information obtained and decide whether there is sufficient basis to proceed. The Prosecutor shall inform the Bureau of the Court of the nature and basis of the decision taken. In the case of a decision by the Prosecutor not to proceed, the Bureau, acting as a Review Chamber, and at the request of the complainant State or the Security Council, shall have the power to review the decision and if it finds that there is sufficient basis, direct the Prosecutor to commence a prosecution.

2. The Prosecutor shall have the power to request the presence of and to question suspects, victims and witnesses, to collect evidence, including the disclosure and production of any documentation or exhibits relevant to the complaint, and to conduct on-site investigations.

3. In carrying out these tasks, the Prosecutor may, as appropriate, seek the cooperation of any State in a position to provide assistance and shall have the authority to request the Court to issue such subpoenas and warrants as may be required, including for the arrest and detention of a suspect.

4. A person suspected of a crime shall:

(a) Prior to being questioned in an investigation under the Statute, be informed of the right to remain silent without such silence being a consideration in the determination of guilt or innocence, and of the right to have the assistance of counsel of the suspect's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the suspect by the Court;

(b) Not be compelled to testify or to confess guilt;

(c) If questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services, and translations of documents on which the suspect is to be questioned.

Commentary

(1) The Prosecutor, upon notification by the Registrar of the receipt of a complaint, is responsible for the investigation and the prosecution of the alleged crime, as provided in article 13. The Prosecutor must, in consultation with the Bureau, appoint the qualified staff required to conduct the investigation of the alleged crime pursuant to article 13 and initiate the investigation, unless the Prosecutor reviews the complaint and supporting documentation and concludes that there is no possible basis for such an investigation. While most members felt that the Prosecutor should be required to conduct at least a preliminary investigation of a complaint filed by a State or the Security Council, one member questioned setting the Tribunal machinery in motion if the complaint was completely groundless.

(2) In conducting the investigation, the Prosecutor would have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. The Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. During the investigation, the Prosecutor may request the Bureau to issue such orders on behalf of the Court since a Chamber may not be convened until a later stage when the investigation has produced sufficient information for an indictment and confirmed the probability of a trial, assuming that the presence of the alleged perpetrator is secured or not required according to paragraph 1 (h) of article 44.

(3) At the investigation phase of a criminal proceeding, a person who is suspected of having committed a crime may be questioned concerning the allegations. Prior to questioning, the suspect must be informed of the following rights: the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel, freely chosen or provided, if necessary, during questioning; and the right to interpretation during questioning, if necessary.

(4) There is some overlap between the provisions concerning the rights of the suspect, a person believed to have committed a crime but not yet charged, and the rights of the accused, a person formally charged with the crime in the form of an indictment, under this Statute. However, the rights of the accused during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example the right not to

be compelled to confess to a crime. Thus, the Working Group felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase before the person has actually been charged with a crime. It is also necessary to distinguish between the rights of the suspect and the rights of the accused since the former are not as extensive as the latter. For example, the suspect does not have the right to examine witnesses or to be provided with all incriminating evidence, rights which are guaranteed to the accused under article 44, paragraphs 1 (d) and 3.

(5) Following the investigation, the Prosecutor must assess the information obtained and decide whether or not there is a sufficient basis to proceed with the preparation of an indictment for which the Prosecutor must establish a prima facie case. The Prosecutor must inform the Bureau of the nature and basis of the decision taken. The Bureau may, at the request of the complainant State or the Security Council, review a decision of the Prosecutor not to prepare an indictment and proceed with the prosecution and may also direct the Prosecutor to do so if the Court finds that there is a sufficient basis for such action. This reflected the view that there should be a judicial review of the Prosecutor's decision not to proceed with a case, assuming that the complainant State or the Security Council was sufficiently convinced of the matter to request such a review. However, other members believed that such a review was inconsistent with the independence and the discretion of the Prosecutor in deciding, based on his or her experience and expertise, whether the results of the investigation warranted further action. They also raised practical questions concerning the effectiveness of requiring the Prosecutor to proceed with a case under such circumstances.

Article 31

Commencement of prosecution

1. Upon a determination that there is a sufficient basis to proceed, the Prosecutor shall prepare an indictment containing a statement giving particulars of the facts and indicating the crime or crimes with which the accused is charged under the Statute.

2. Prior to an indictment by the Court, a person may be arrested or detained under the Statute, for such period as may be determined by the Court in each case, only pursuant to:

(a) A determination by the Court, that such arrest or detention is necessary because there is sufficient ground to believe that such person might have committed a crime within the jurisdiction of the Court; and, unless so arrested the person's presence at trial cannot be assured; and

(b) The issuance of a warrant or other order of arrest or detention by the Court.

Commentary

While the complaint is the mechanism that initiates the investigation of the alleged crime, the indictment is the mechanism that initiates the prosecution of the criminal case. Following a determination that the information obtained during the investigation confirms that the crime alleged in the complaint has apparently been committed by the suspect, the Prosecutor shall proceed with the preparation of an indictment stating the relevant facts and the crime or crimes that the person to be charged is alleged to have committed under the Statute. Prior to the affirmation of the indictment, the Court, namely the Bureau or possibly a Chamber acting on behalf of the Court, may order the arrest or detention of the suspect on the basis of a preliminary determination that there are sufficient grounds for the charges and a risk that the person's presence at trial cannot otherwise be assured. The person shall be detained for a period to be determined by the Court in each case.

Article 32

The indictment

1. The indictment together with the necessary supporting documentation shall be submitted by the Prosecutor to the Bureau of the Court.

2. The Bureau, acting as an Indictment Chamber, shall examine the indictment and determine whether or not a prima facie case exists.

3. If the Bureau concludes that a prima facie case exists, it shall affirm the indictment and convene a Chamber in accordance with article 37.

4. On affirming the indictment, the Bureau may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention or surrender of persons, and any other orders as may be required for the conduct of the trial.

Commentary

(1) The Prosecutor submits the indictment and necessary supporting documentation to the Court. The Bureau of the Court, acting as an Indictment

Chamber, reviews the indictment and decides whether it provides prima facie evidence of the crime alleged to have been committed by the person named in the indictment. If the Bureau concludes that the Prosecutor has established a prima facie case, then the Bureau affirms the decision to charge contained in the indictment and convenes a Chamber, in accordance with article 37, to conduct the trial. It is at this point in time, when the indictment is affirmed by the Court, that the person is formally charged with the crime and the former "suspect" becomes the "accused". Once the indictment has been affirmed, the Bureau may issue an arrest warrant or other orders requested by the Prosecutor which may be required for the prosecution and conduct of the trial. However, the Chamber would assume responsibility for pre-trial orders and other matters relating to the trial once it is convened.

(2) Some members although accepting the principle that the indictment prepared by the Prosecutor should be subject to review and affirmation by the judicial organ of the Tribunal, also felt that this affirmation of the decision to charge the accused on the basis of a prima facie case should in no way be perceived as a pre-judgement by the Court as a whole on the final determination of the guilt or innocence of the accused. For this reason, they believed that careful consideration should be given to the appropriate organ of the Court to be entrusted with reviewing and determining the sufficiency of the indictment.

Article 33

Notification of the indictment

States parties to the Statute

1. The Court, with a view to ensuring prompt notification of an indictment to the accused, shall immediately following the issuance of an indictment:

(a) notify all States parties of the indictment and of any order relating to the accused that may have been issued by the Court; and

(b) transmit to the State Party, or States parties, within whose jurisdiction the accused is then believed to be:

(i) the indictment and any order relating to the accused that may have been issued by the Court;

(ii) a copy of the Statute of the Court;

(iii) a copy of the rules of evidence and procedure of the Court;

(iv) a statement of the accused's right to obtain legal assistance as set out in article 44, paragraph 1(b) of the Statute; and

(v) if one of the working languages of the Tribunal is not the principal language understood and spoken by the accused, a translation under the auspices of the Tribunal of the indictment and other documents referred to in the preceding subparagraphs.

2. Where the State party or States parties, within whose jurisdiction the accused is believed to be, have accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall order such State Party, or States parties:

(a) to ensure that the indictment, together with the other documents referred to in paragraph 1 of this article, are personally notified to the accused: and

(b) if an order for the arrest or detention of the accused has been issued by the Court, to ensure that the accused is arrested or detained immediately following such notification.

3. Where the State Party or States parties, within whose jurisdiction the accused is believed to be, have not accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall request such State or States:

(a) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and

(b) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

States not parties to the Statute

4. Where the State or States, within whose jurisdiction an accused is believed to be, are not parties to the Statute, the Court shall with a view to prompt notification of an indictment to the accused and, where necessary, the arrest or detention of the accused, immediately following the issuance of an indictment:

(a) notify such State or States of the indictment and of any order of the Court relating to the accused;

(b) transmit to such State or States copies of the indictment and other documents referred to in subparagraph 1(b) of the present article; and

(c) invite such State or States:

(i) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and

(ii) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

Cases where personal notification of the indictment may not be feasible

5. If personal notification of the indictment, together with the other documents, is not made to the accused within a period of sixty days after the indictment, the Court shall prescribe such other manner of bringing the indictment to the attention of the accused.

Commentary

(1) To ensure that the accused is promptly notified of the indictment, the Court shall immediately notify all States parties to the Statute of the indictment and any related orders and transmit the indictment and other relevant documents to the State party in whose territory the accused is believed to be located, according to article 33. In the latter case, the documents are provided to the State party with a view to their transmission to the accused at such time as the person is located and taken into custody. Thus, the accused is not only to be served with the indictment but also provided with documents necessary for the preparation of the defence, including a statement explaining the right to counsel, the Statute setting forth the rights of the accused and the trial procedures, and the rules of evidence and procedure of the Court. If necessary, the accused must be provided with a translation of these documents.

(2) This article provides for the notification of the indictment to the accused in three different situations depending on whether the person is believed to be located in: (1) a State which is a party to the Statute and which has accepted the jurisdiction of the Court with respect to the alleged crime, (2) a State which is a party to the Statute but has not accepted the jurisdiction of the Court with respect to the alleged crime, or (3) a State which is not a party to the Statute.

(3) In the first instance, the Court shall order the State to personally notify the accused of the indictment, transmit the accompanying documents and comply with any arrest or detention order. Such a State has recognized the existence of the crime as a matter of law and has accepted these obligations as a party to the Statute.

(4) In the second instance, the Court shall request the State to cooperate in notifying, arresting or detaining the accused. As a State party, the State

has a general obligation to cooperate with the Tribunal. However, it does not have specific obligations regarding persons charged with crimes with respect to which it has not accepted the jurisdiction of the Court. Furthermore, it may not be a party to the treaty defining the crime.

(5) In the third instance, the Court shall transmit the indictment and other relevant documents and invite the State to cooperate in notifying, arresting or detaining the accused. Although such a State has not accepted any obligations with respect to the Tribunal, it should be given an opportunity and encouraged to cooperate in the prosecution of persons alleged to have committed serious crimes affecting the international community as a whole. If the State is a party to the treaty defining the crime, it may be prepared to do so.

(6) In the event that personal notification is not achieved within sixty days of the indictment, the Court may prescribe an alternative method of informing the accused of the charges, a matter which may be dealt with in greater detail in the rules to be adopted by the Court.

Article 34

Designation of persons to assist in a prosecution

1. A State party may, at the request of the Prosecutor, designate persons to assist in a prosecution.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to the exercise of their functions under this article.

Commentary

(1) This article is intended to facilitate the initiation of an investigation and prosecution without delay upon receipt of a complaint by making qualified and experienced personnel available on request to the Prosecutor who will not have a permanent staff to call upon when the need arises, at least during the initial phase of the Tribunal as envisaged in this Statute. States Parties may, at the request of the Prosecutor, designate persons available to assist in the investigation or prosecution of a case, either a particular case or in general, under paragraph 1 of this article. There would be utility, in the Working Group's view, in the preparation by the Registrar of a list of persons

capable of assisting in investigations or prosecutions. States could be invited to suggest names for inclusion in such a roster.

(2) To avoid the disruption of an investigation or prosecution which is in progress, States should be prepared to make persons available for the duration of the prosecution. Any such persons would serve under the direction of the Prosecutor and would be prohibited from seeking or receiving instructions from their Government or any other source. A similar provision concerning the staff of the United Nations is found in Article 100 of the United Nations Charter.

(3) The provision is intended to assist the Prosecutor in appointing qualified staff pursuant to paragraph 5 of article 13. However, the Prosecutor is not limited to the persons designated by States Parties in making these appointments. The Prosecutor is given the authority to select the persons who possess the necessary qualifications and experience to carry out the tasks assigned to the Procuracy with a view to ensuring the competence and independence of the Procuracy.

Article 35

Pre-trial detention or release on bail

1. The Court shall decide whether an accused person who is brought before it shall continue to be held in detention or be released on bail.

2. If the Court decides to hold the accused in detention, the State on whose territory the seat of the Court is established shall make available to the Court an appropriate place of detention and, where necessary, the requisite guards.

Commentary

(1) Once the accused has been arrested and transferred to the Tribunal, the Court shall decide whether the accused should be detained or released on bail while awaiting trial.

(2) Given the serious nature of the crimes under this Statute, there is every reason to believe that it will be necessary to detain the accused. Thus, paragraph 2 of this article requires the State on whose territory the Tribunal is located to provide the necessary detention facilities and the requisite guards. The Working Group believed that the details concerning such matters, as well as other appropriate security arrangements which may be deemed necessary, should be addressed in the agreement to be concluded by the Tribunal and the State selected for the seat of the Tribunal.

## PART 4: THE TRIAL

### Article 36

### Place of Trial

1. Unless otherwise decided by the Court, the place of the trial will be the seat of the Tribunal.

2. By arrangement between the Court and the State concerned, the Court may exercise its jurisdiction in the territory of any State party, or in the territory of any other State.

3. Where practicable and consistent with the interest of justice, a trial should be conducted in or near the State where the alleged crime was committed.

### Commentary

(1) The trials will generally take place at the seat of the Tribunal and make use of the available personnel and facilities. Alternatively, the Court may decide, in the light of the circumstances of a particular case, that it would be more practical to conduct the trial at a location which is situated closer to the scene of the alleged crime to facilitate the transportation of witnesses and evidence in a shorter period of time and at a lower cost.

(2) However, the proximity of the trial to the place where the type of crimes referred to in the Statute were allegedly committed may cast a political shadow over the judicial proceedings, thus raising questions concerning respect for the defendant's right to a fair and impartial trial, or may create unacceptable security risks for the defendant, the witnesses, the judges and the other staff of the Tribunal. Thus, trials may take place in a State other than the host country only when it is both practicable and consistent with the interest of justice to do so.

(3) The Chamber must take into account these two considerations in determining the place of the trial in accordance with paragraph 1 (a) of article 39. The Chamber may request the views of the Prosecutor or the defence on this question without unnecessarily delaying the commencement of the trial.

(4) Trials taking place in States other than the host country would be conducted pursuant to an arrangement between the Tribunal and the State concerned, which may or may not be a State party to the Statute. This arrangement would need to address matters similar to those to be provided for

in the agreement with the host country and possibly other matters if the trial is to be held in a State which is not a party to the Statute. It was suggested that the standard conditions for such an arrangement could be set forth in an annex to the Statute, with the possibility of adding any additional provisions that may be required in a particular case. The Working Group recognized that it may be more appropriate to move this provision to the article of the Statute that will provide for the headquarters agreement, an article to be added at a later stage.

Article 37

Establishment of Chambers

1. Cases shall be tried by Chambers of the Court.

2. A Chamber of the Court shall be established in accordance with the rules of the Court. Each Chamber shall consist of five judges.

3. Several Chambers may be established and may sit concurrently.

4. No judge from a complainant State or from a State of which an accused is a national shall be a member of the Chamber dealing with that particular case.

Commentary

(1) Persons charged with crimes under the Statute would be tried by a Chamber of the Court consisting of five judges to be established in accordance with the rules to be adopted by the Court.

(2) Depending on the number of cases referred to the Court, it may be necessary, to ensure respect for the right of the accused to be tried without undue delay, to convene more than one Chamber and conduct several trials concurrently.

(3) In the light of the nature of the crimes covered by the Statute, no judge may serve in a Chamber convened to hear a case on the basis of a complaint brought by the State of which the judge is a national or against an accused who is of the same nationality as the judge. This is to avoid any questions concerning the independence or impartiality of the Court and to ensure that the accused receives a fair trial.

(4) The Chamber is to be convened by the Bureau to hear a particular case upon the affirmation of an indictment in accordance with article 31. Some members believed that it would be appropriate for the Bureau, as the standing

body of the judicial organ consisting of the officers of the Court, to appoint the judges who would serve in a Chamber. However, other members believed that the membership of the Chambers should be predetermined on an annual basis and should follow the principle of rotation to ensure that all judges would have the opportunity to participate equally in the work of the Court. It was also suggested that the selection should be based on an objective criteria set forth in the rules to be adopted by the Court, rather than the subjective decision of the three members of the Bureau. The Working Group invited the Commission and the General Assembly to comment on this issue which would be considered at a later stage.

Article 38

Disputes as to Jurisdiction

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it.

2. Challenges to its jurisdiction may be made, in accordance with procedures laid down by the rules:

(a) at the commencement of the trial, by an accused or any State party;

(b) at any stage of the trial, by the accused.

3. If a State challenges the jurisdiction of the Court under paragraph 2 (a), the accused has a full right to be heard in relation to the challenge. A decision that there is jurisdiction shall not be reopened at the trial.

Commentary

(1) The competence of the Court is limited to those cases which are within its jurisdiction as defined by the Statute. The Court must satisfy itself that it has jurisdiction to hear a particular case before proceeding to do so.

(2) Any State Party may challenge the jurisdiction of the Court with respect to a particular case in preliminary proceedings at the commencement of the trial. States Parties which may be called upon to assist in the prosecution of the case, from serving documents to providing evidence and surrendering the accused, should have the right to challenge the jurisdiction of the Court, not at any stage in the proceeding, but at least at the commencement of the trial. It would be unreasonable to allow a State Party duly notified of the

indictment to wait until the proceedings were almost completed to raise such an objection, particularly since the proceedings may be both lengthy and costly. The accused has the right to participate in the proceedings concerning the jurisdictional challenge raised by a State Party. Once the Court has decided that it has jurisdiction, that decision cannot be reopened at the trial.

(3) Some members felt that only States which have a direct interest in the case should be allowed to challenge the jurisdiction of the Court. However, other members felt that since the criminal jurisdiction was conferred on the Court by all of the States Parties, any one of them should have the right to question whether the Court was acting in accordance with this conferral of jurisdiction.

(4) The accused has the right to challenge the jurisdiction of the Court at any stage of the trial. This reflected the view that the accused should, as a matter of principle, have the right to challenge the jurisdiction of a court in a criminal proceeding at any stage of the proceeding. However, some members felt that the question of jurisdiction should be determined by the Court as a preliminary issue and, therefore, jurisdictional challenges should be raised by States Parties or the accused at the commencement of the trial.

(5) In addition, it was suggested that, given the very serious consequences of being charged with one of the crimes covered by the Statute, it would be imperative for the accused to be allowed to challenge the jurisdiction of the Court, and possibly the sufficiency of the indictment, at an earlier stage than the trial since a person's reputation would suffer greatly by merely being charged with one of the crimes referred to in the Statute. However, other members noted that the limited institutional structure of the Court did not provide for an existing judicial body to hear such challenges before the commencement of the trial. The Statute does allow a State Party ordered to arrest and surrender the accused to challenge the indictment on jurisdictional or other grounds in paragraph 7 of article 63. In the absence of a Chamber, such a challenge could be decided by the Bureau, although this may be the same body that initially issued the indictment.

(6) The Working Group decided to return to this matter at a later stage and invited comments on the following questions:

(a) Should all States Parties or only those with a direct interest in the case have the right to challenge the Court's jurisdiction?

(b) Should the Statute provide for the possibility of pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment? If so, should such challenges be decided by the Bureau or should a Chamber be established at the pre-trial stage to decide such matters?

Article 39

Duty of the Chamber

1. If the Bureau has not already done so under article 32, the Chamber shall decide, as early as possible in each case:

(a) the place at which the trial is to be held, having regard to article 36;

(b) the language or languages to be used during the trial, having regard to article 18 and article 44, paragraphs 1 (f) and 2.

2. The Chamber may order:

(a) the disclosure to the defence of documentary or other evidence available to the Prosecutor, having regard to article 44, paragraph 3;

(b) the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial.

3. At the commencement of the trial, the Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, and allow the accused to enter a plea of guilty or not guilty.

Commentary

(1) Once the Chamber has been established it must decide certain preliminary matters and may issue various pre-trial orders at the request of either the prosecution or the defence. The Chamber determines the place of the trial in accordance with the provisions of article 36, unless the Bureau has already done so when it convened the Chamber in accordance with article 32.

(2) The Chamber must also decide on the languages to be used during the trial, bearing in mind the right of the accused to a simultaneous interpretation of the proceedings, if necessary, according to article 18, and the two working languages of the Tribunal, English and French, as provided in article 44.

(3) The Chamber may issue pre-trial orders to ensure the right of the accused to have adequate time and facilities for the preparation of the defence. Prior to the commencement of the trial, the accused has the right to receive

all incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution, according to paragraph 3 of article 43. The present article authorizes the Chamber to order the Prosecutor to provide such information.

(4) The Chamber may also issue orders requiring the defence and the prosecution to exchange information so that both parties are aware of the issues to be decided at the trial and adequately prepared to present their arguments on those issues at the commencement of the proceedings. This will ensure that the trial is conducted efficiently and without unnecessary delays.

(5) At the commencement of the trial, the presiding judge of the Chamber must read the indictment to make sure that the accused understands the charges. Before allowing the accused to enter a plea, the Court must also satisfy itself that the person has been informed of and understands the rights of the accused and that those rights have been fully respected.

Article 40

Fair trial

1. The Chamber shall ensure that a trial is fair and expeditious, conducted in accordance with the present Statute and the rules of procedure and evidence of the Court, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A trial shall be public, unless the Chamber determines that certain proceedings be in closed session, in accordance with article 46 of the Statute.

Commentary

This article establishes the responsibility of the Chamber, acting on behalf of the Court, to ensure that any person charged with crimes under this Statute receives a fair and expeditious trial which fully respects the rights of the accused set forth in articles 40 to 45. The Chamber must also conduct the proceedings in accordance with the uniform procedures and standards established in the rules of procedure and evidence to be adopted by the Court. The trial is to be conducted in public, unless the Chamber determines that it is necessary to close the proceedings to protect the accused, victims or witnesses in accordance with article 46. For example, this may be necessary to protect the privacy of victims or to avoid public disclosure of the identity of witnesses whose safety may be threatened. While the Court is required to have due regard for the protection of victims and witnesses, this

must not interfere with full respect for the rights of the accused to a fair trial. Thus, while the Court may order the non-disclosure to the media or the general public of the identity of a victim or witness, the right of the accused to question the prosecution witnesses must be fully respected under paragraph 1 (d) of article 44.

Article 41

Principle of Legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution under article 22, unless the treaty concerned was in force [and its provisions had been made applicable in respect of the accused;]

(b) in the case of a prosecution under article 26 (2) (a), unless the act or omission in question constituted a crime under international law; or

(c) in the case of a prosecution under article 26 (2) (b), unless the act or omission constituted a crime under the relevant national law, in conformity with the treaty,

at the time the act or omission occurred.

Commentary

(1) The principle of nullum crimen sine lege is a fundamental principle of criminal law which is recognized in article 15 of the United Nations Covenant on Civil and Political Rights which states as follows: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed." It recognizes that such act or omission may be "criminal according to the general principles of law recognized by the community of nations."

(2) In accordance with the proposed article, a person may be prosecuted for an act or omission which was defined as a crime at the time it occurred by any one of the following sources of law: (1) a treaty which was in force [and applicable with respect to the accused]; (2) customary international law; or (3) national law enacted in conformity with the relevant treaty.

(3) With regard to crimes defined in a treaty, the language that appeared within brackets in subparagraph (a) reflected a difference of opinion as to whether, for the principle of legality to apply, the State Party must have

fulfilled any obligation provided for in the treaty or required as a matter of internal law to either adopt implementing legislation or to define the crime as a matter of national law, respectively. Some members felt that the treaty did not directly create any obligations for the individual, while others believed that in the case of crimes under international law the prohibition and the criminal responsibility flowed directly from international law, emphasizing the source of the prohibition of the conduct and the criminalization of the offence. With respect to the latter point, it was suggested that there may be circumstances in which it would be possible to prosecute an individual for a crime under international law in an international tribunal even though the same person could not be tried in a national court due to the absence of the necessary provision in the national criminal code. One member felt that the rules of international criminal law should be applied uniformly rather than creating inequalities as to the criminal responsibility of different individuals based on requirements of internal law or the failure of a State Party to comply with its treaty obligations.

Article 42

Equality before the Tribunal

All persons shall enjoy equality before the Tribunal.

Commentary

This provision is consistent with article 14 of the United Nations Covenant on Civil and Political Rights which states that "All persons shall be equal before the courts and tribunals." The term "persons", as it is used in this provision, is intended to cover various categories of persons, including not only accused persons, but also victims and witnesses, who may come before the Court to be tried or to testify in a proceeding and should be treated equally.

Article 43

Presumption of Innocence

A person shall be presumed innocent until proved guilty.

Commentary

This provision recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and the burden of proof rests with the prosecution. The presumption of innocence is recognized in article 14 of the

United Nations Covenant on Civil and Political Rights which states that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The Prosecutor has the burden to prove every element of the crime beyond a reasonable doubt or in accordance with the standard for determining the guilt or innocence of the accused. If the Prosecutor fails to prove that the accused committed the alleged crime, then the person must be found not guilty of the charges contained in the indictment.

Article 44

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 40, paragraph 2, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to be informed of the right of the accused to conduct the defence or to have the assistance of counsel of the accused's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the accused by the Court;

(c) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel;

(d) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(e) to be tried without undue delay;

(f) if any of the proceedings of, or documents presented to, the Court, are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt;

(h) to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2. At the commencement of a trial, the Court shall ensure that the indictment and other documents referred to in article 33, paragraphs 1 (h) and 4 (b) of the Statute, and copies thereof in a

language understood and spoken by the accused, have been provided to the accused sufficiently in advance of the trial to enable adequate preparation of the defence.

3. All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.

Commentary

(1) This article sets forth in paragraph 1 the minimum guarantees to which the accused is entitled in the determination of the criminal charges. It reflects the fundamental rights of the accused set forth in article 14 of the United Nations Covenant on Civil and Political Rights.

(2) In connection with paragraph 2 (7), the question of the possibility of holding trials in absentia gave rise to conflicting views in the Working Group. According to some members, this possibility was completely unacceptable from the perspective of a fair trial which respects the fundamental rights of the accused. Attention was drawn to article 14 of the United Nations Covenant on Civil and Political Rights which characterizes the right of the accused to be present at the trial as a minimum guarantee to which everyone shall be entitled, in full equality, in the determination of any criminal charge. Furthermore, they felt that judgments by the Court without the actual possibility of implementing them might lead to a progressive loss of its authority and effectiveness in the eyes of public opinion.

(3) Other members were strongly in favour of drawing some distinctions, as regards, in particular, three possible situations: (a) the accused has been indicted but is totally unaware of the proceedings; (b) the accused has been duly notified but chooses not to appear before the Court; and (c) the accused has already been arrested but escapes before the trial is completed. Most of those members thought that while in hypothesis (a), an accused person should not be judged in absentia, in cases (b) and (c) a trial in absentia is perfectly in order, otherwise, the Court's jurisdiction would, in fact, be subject to the "veto" of the accused. Furthermore, they felt that in such cases a judgment in absentia would in itself constitute a kind of moral sanction which could contribute to the isolation of the accused wherever located and, possibly, to eventual capture. It was also argued in favour of

trials in absentia that in criminal cases evidence should be effectively preserved by means of an expeditious trial. Such evidence might be lost if proceedings were delayed until such time as the accused could be brought before the Court. One member felt that trials in absentia could be appropriate under (c) above but not under (a) or (b). Another member also mentioned disruption of the trial by the accused, security reasons, or ill health of the accused, as valid grounds for pursuing the trial without the presence of the accused.

(4) Members in favour of trials in absentia also generally felt that such a judgment should be provisional in the sense that if the accused appeared before the Court at a later stage, then a new trial should be conducted in the presence of the accused.

(5) One member felt that if the Commission decided to allow trials in absentia, then this matter would need to be regulated in greater detail in the Statute.

(6) The Working Group invited the Commission and the General Assembly to comment on the question of trials in absentia.

(7) As in other provisions of this Statute, paragraph 2 of this article recognizes the responsibility of the Court, or a Chamber acting on behalf of the Court, to ensure respect for the rights of the accused, including the right to have adequate time and facilities for the preparation of the defence in accordance with paragraph 1 (c). At the commencement of the trial, the Court must ensure that the indictment and the other documents referred to in article 33 have been provided to the accused sufficiently in advance of the trial.

(8) The accused is also entitled to receive all incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution in reasonable time to prepare for the defence, according to paragraph 3 of this article. Whereas the prosecution is required to provide the accused with all exculpatory evidence to give effect to the right to prepare and present a defence, the prosecution is not required to provide incriminating evidence which may be privileged or may jeopardize the safety of victims or witnesses if it is not going to be used by the prosecution during the trial.

## Article 45

### Double jeopardy (non bis in idem)

1. No person shall be tried before any other court for acts constituting crimes referred to in articles 22 or 26, for which that person has already been tried under this Statute.

2. A person who has been tried by another court for acts constituting crimes referred to in articles 22 or 26 may be subsequently tried under this Statute only if:

(a) the act in question was characterized as an ordinary crime; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which any sentence imposed by another court on the same person for the same act has been served.

### Commentary

(1) The principle of non bis in idem, sometimes referred to as the prohibition against double jeopardy, is a fundamental principle of criminal law. This principle is recognized in article 14 (7) of the United Nations Covenant on Civil and Political Rights which states that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

(2) The present provision recognizes this principle with respect to the Court. It is also inspired by article 10 of the Statute of the International Tribunal created by the Security Council for crimes committed in the former Yugoslavia, with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

(3) The prohibition on subsequent trials under paragraph 1 applies only where the Court has actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime. Since the jurisdiction of national courts would not be affected unless the Court had actually exercised jurisdiction with respect to the merits, it was not considered necessary to include a provision equivalent to article 9 of the

Statute adopted by the Security Council with respect to the question of concurrent jurisdiction.

(4) The phrase "characterized as an ordinary crime" in paragraph 2 (a) refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in article 22 or 26 of this Statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under article 147 of the Fourth Geneva Convention of 1949.

(5) Paragraph 2 (b) of this article reflected the view that the Tribunal should be able to prosecute a person for acts constituting crimes referred to in this Statute if the previous criminal proceeding against the same person for the same acts was really a "sham" proceeding, possibly even designed to shield the person from being tried by the Court. In this connection, one member suggested that the need for this provision was demonstrated by some of the war crimes trials in national courts after the First and Second World Wars. However, other members expressed strong reservations about allowing the Court to review the trial proceedings of national courts as an unacceptable encroachment on State sovereignty.

(6) In the event that the Court convicts a person under either of the situations contemplated in paragraph 2, it must take into consideration in the determination of the appropriate penalty under articles 52 to 54 the extent to which the person has actually served a sentence imposed by another court for the same acts. While a person may be convicted of more than one crime based on the same acts, for example murder and war crimes, the person should not be subject to multiple sentences for the same acts without any regard for the extent to which a previous sentence has already been served.

## Article 46

## Protection of the accused, victims and witnesses

The Chamber shall take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means.

### Commentary

(1) The Chamber, acting on behalf of the Court, has the responsibility and the authority to take the necessary steps to protect the accused, as well as

victims and witnesses participating in the proceedings. The non-exhaustive list of such measures provided in this article include ordering that the trial shall be conducted in closed proceedings or allowing the presentation of evidence by electronic means such as video cameras.

(2) In conducting the proceedings, the Court must have due regard for the need to protect both victims and witnesses but only to the extent that this is consistent with full respect for the rights of the accused, in accordance with article 40. For example, allowing a key prosecution witness to testify by video camera may raise questions concerning the right of the defendant to examine prosecution witnesses and the ability of the judges to assess the credibility of witnesses, which is often critical in criminal proceedings, if they are not present in the courtroom. At the same time, such procedures may be the only way to obtain the testimony of a particularly vulnerable victim or witness.

Article 47

Powers of the Court

1. The Court shall, subject to the provisions of the Statute and in accordance with the rules of procedure and evidence of the Court have, inter alia, the power to:

(a) require the attendance and testimony of witnesses;

(b) require the production of documentary and other evidentiary materials;

(c) rule on the admissibility or relevance of issues, evidence and statements;

(d) maintain order in the course of a trial.

2. The Court shall ensure that a complete record of a trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar under the authority of the Court.

Commentary

(1) This article sets forth in paragraph 1 the general powers of the Court in conducting the proceedings, including ordering the attendance and testimony of witnesses, the production of documentary or other evidence, determining the relevance or admissibility of evidence, and maintaining order in the courtroom.

(2) There must be a complete and accurate record of the trial proceedings which is to be maintained and preserved by the Registrar under the authority of the Court. This record of the trial would be of particular importance to the defendant, as well as the Prosecutor, in the event of a conviction which is subject to appeal or revision under articles 55 or 57, respectively.

Article 48

Evidence

1. The Court shall, on the application of the prosecution or of the defence, require any person to give evidence at the trial unless it concludes that the evidence of such person would not contribute to clarifying any matter of relevance to the trial. The Court may also on its own initiative require any person to give evidence at the trial.

2. Before testifying, each witness shall make such oath or declaration as is customary in judicial proceedings in the State of which the witness is a national.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its admissibility or relevance. Any such ruling shall be made in open court.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice thereof.

5. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights shall not be admissible.

6. A witness who has not yet testified shall not be present when the evidence of another witness is taken. However, a witness who has heard the evidence of another witness shall not for that reason alone be disqualified from giving evidence.

7. The Court may accept evidence in such forms as it deems appropriate in accordance with its rules of procedure and evidence.

Commentary

(1) While some members felt that the rules of evidence were too complex to be addressed in the Statute, other members felt that it should include some basic provisions on this important subject. The Nuremberg Tribunal, which was not bound by technical rules of evidence, was required to admit any evidence which had probative value, according to article 19 of its Charter.

(2) The Court, acting on the recommendation of the Bureau, would establish its own rules of evidence and procedure pursuant to article 19 of the present

Statute. It may accept evidence in such forms as it deems appropriate in accordance with those rules, under paragraph 7 of this article. The Court may also take judicial notice of facts which are common knowledge rather than requiring proof of such facts, according to paragraph 4 which is similar to article 21 of the Nuremberg Charter.

(3) The Court shall require a person to give evidence or testify at the trial, at the request of the prosecution or the defence or on its own initiative, unless the Court concludes that such evidence or testimony would be of no probative value in determining any question which is at issue in a particular case, according to paragraph 1 of this article. To ensure the veracity of testimony, witnesses would be required to take the oath or make the declaration normally required in their national courts pursuant to paragraph 2. For the same reason, a witness who had not yet testified should not be present when other witnesses were testifying during the trial, according to paragraph 6. However, a witness who heard the testimony of other witnesses before testifying would not be disqualified unless the Court determined that this was necessary because of the possibility that the testimony would be tainted.

(4) The Working Group noted that the Statute did not include a provision making it a crime to give false testimony before the Court. Thus, the obligation to tell the truth embodied in the oath or declaration required before a witness may testify was not accompanied by the threat of punishment under this Statute. There were some doubts as to whether it would be appropriate to address this matter in the Statute, rather than requesting States parties and other States which accepted the jurisdiction of the Court to address this matter by extending their national criminal laws concerning perjury or false testimony to cover violations of the relevant national oath or declaration by their nationals before the Court. The Working Group decided to return to this question.

(5) The prosecution or defence may be required to inform the Court of the nature and purpose of evidence proposed for introduction in the trial to enable it to make a prior determination of relevance or admissibility, according to paragraph 3, which is similar to article 20 of the Nuremberg Charter. This requirement is particularly important in criminal trials before a jury to avoid the introduction of inadmissible evidence which may be prejudicial to the defendant and subsequently difficult for lay persons to

ignore notwithstanding judicial instructions to the contrary. However, it is also an important requirement in other criminal trials to enable a court to fulfil its responsibility for ensuring an expeditious trial limited in scope to a determination of the validity of the charges against the accused and issues relating thereto. Some members also stressed the desirability of this provision to prevent the collection or production of evidence from being used as a delaying tactic during the trial, as well as the substantial costs which may be involved in translating inadmissible evidence. Other members felt strongly that this provision should not be interpreted as allowing the Court to exclude evidence in ex parte or closed proceedings, rather than following the normal procedure in which motions for the introduction of evidence were made by counsel, in the presence of opposing counsel, and decided by the Court in public proceedings. It was suggested that the Court's rulings as to the admissibility of evidence should be subject to appeal. The Working Group decided to return to the question of providing for interlocutory appeals at a later stage. This would also require consideration of the appropriate body to decide such matters, for example the Bureau or an Appeals Chamber, bearing in mind the nature of the Tribunal.

(6) The Court must exclude any evidence obtained either directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights, according to paragraph 5. With regard to the standard for applying the exclusionary rule, one member suggested that only evidence obtained in violation of a peremptory norm of human rights should be inadmissible. However, other members felt that the Court should have discretion to exclude any evidence obtained in violation of international law. The Working Group decided to return to this question.

Article 49

Hearings

1. The indictment shall be read to the accused and the Court shall ask the accused to plead guilty or not guilty to each of the charges in the indictment.

2. If an objection is raised as to the jurisdiction of the Court, the Court shall rule on the objection prior to proceeding any further with the trial.

3. The Prosecutor shall make an opening statement and call witnesses and present evidence on behalf of the prosecution and, thereafter, the defence may make an opening statement and may call witnesses and present evidence on behalf of the accused.

4. When hearings of evidence have been completed, the prosecution shall make its closing statement and, thereafter, the defence may make its closing statement.

5. The Court shall ask whether the accused wishes to make a statement before it delivers the judgment, and shall, if the accused so wishes, permit such a statement to be made.

6. The Court shall, thereafter, retire for closed and private deliberations upon the judgment it is to make.

Commentary

(1) The trials conducted by a Chamber of the Court would follow the general procedure set forth in this article, which is similar to a somewhat more detailed provision contained in article 24 of the Nuremberg Charter. The Court would first read the indictment and request the defendant to enter a plea of guilty or not guilty with respect to each of the crimes alleged in the indictment. Any jurisdictional challenges raised in accordance with article 38 must be decided before continuing with the trial. The Prosecutor would first present the case for the prosecution which would be followed by the case for the defence. At the conclusion of the hearing, the prosecution would be required to make a closing statement demonstrating that the burden of proof had been met. The defence would be entitled to make a closing statement and thus have the "last word", but would not be required to do so since the accused is entitled to a presumption of innocence. One member suggested that the Court may decide that the prosecution has not met its burden thus obviating the need for the defence to make any statement. At the conclusion of the hearing, the Court shall engage in private deliberations to ensure a full and candid exchange of views resulting in its decision in the case.

(2) The rules to be adopted by the Court would contain more detailed provisions concerning the procedures to be followed throughout the trial to ensure that the proceedings are conducted in accordance with uniform rules and procedures.

Article 50

Quorum and majority for decisions

At least four judges must be present at each stage of the trial. The decisions of the Chambers shall be taken by a majority of the judges.

Commentary

This article provides the general rules concerning the necessary quorum to conduct the trial proceedings and the extent of agreement required for taking decisions. The rules to be adopted by the Court would address such matters in greater detail. However, the Working Group felt that it would be useful to include these provisions in the Statute to establish the general guidelines for the functioning of the Court.

Article 51

Judgment

1. The Court shall pronounce judgments and impose sentences on persons convicted of crimes under this Statute.

2. The judgment of the Court shall be in written form and contain a full and reasoned statement of its findings and conclusions. It shall be the sole judgment or opinion issued.

3. The judgment shall be delivered in open Court.

Commentary

(1) This article confers on the Court the power to pronounce judgments of acquittal or conviction, depending on its determination of the merits of the charges against the accused based on the evidence presented during the trial, and to impose sentences in cases resulting in convictions, in accordance with articles 52 to 54, 66 and 67, paragraph 4 of this Statute. It is at this point in time that the person who was initially suspected of committing a crime, and therefore the subject of an investigation (the suspect), and later accused of committing the crime when the indictment was affirmed (the accused), now becomes the convicted person when the Court decides that the prosecution has met its burden of proving the charges contained in the indictment and pronounces the judgment that the person is guilty as charged.

(2) The term "sentence" was used to refer to the punishment imposed by the Court against a convicted person in a particular case. It was considered

broad enough to encompass the full range of penalties at the disposal of the Court, including imprisonment, fines and the confiscation of unlawfully acquired property.

(3) The judgment must be in writing and be accompanied by a full and reasoned statement of the findings of fact and conclusions of law on which it is based. The Court would issue a single judgment reflecting the opinion of the majority of judges. There would be no dissenting or separate opinions. The judgment would be delivered in a public proceeding.

(4) In connection with paragraph 2, different views were expressed on the desirability of allowing separate or dissenting opinions. The well known dissenting opinion to the Judgment of the Nuremberg Tribunal was issued notwithstanding the silence of the Charter on this question. Those who were opposed to allowing such opinions felt that they would undermine the authority of the Court and its judgments. Some members suggested that judges may hesitate to issue such opinions as a result of concerns for their personal safety given the serious nature of the crimes referred to in the Statute. However, other members believed that judges should have the right to issue separate or dissenting opinions as a matter of conscience, if they chose to do so. It was also suggested that these opinions would be extremely important to the defendant who chose to appeal a conviction and may also be of interest to the Appeals Chamber in deciding whether to overturn the conviction. The Working Group, however, felt that the reasons militating against authorizing dissenting or separate opinions outweighed the possible positive effects of such opinions.

Article 52

Sentencing

1. The Court shall hold a further and separate hearing to consider the question of the appropriate sentences to be imposed on the convicted person and to hear the submissions of the prosecution and of the defence and such evidence as the Court may deem to be of relevance.

2. The Court shall retire for deliberations in private.

3. The decisions of the Court on the sentences shall be delivered in open court.

Commentary

(1) The sentencing process is the first phase of the post-trial procedures. It is generally considered to represent a separate process which is distinct

from the trial. Whereas the purpose of the trial is to determine the truth of the charges against the accused, the purpose of the sentencing hearing is to determine an appropriate punishment in relation to the individual as well as the crime.

(2) This distinction is reflected in the rights of the accused which are often couched in terms of the trial. Many of the fundamental procedural guarantees inherent in a fair trial, notably the right to counsel, also extend to the sentencing hearing. However, other rights of the accused may not be as extensive at that stage of the proceeding, for example the right to cross-examine witnesses. Also, a court may consider evidence at the sentencing hearing, for example out-of-court statements, which may not be admissible during the trial.

(3) The Working Group felt that these considerations merited a further and separate sentencing hearing, while leaving the details of such proceedings to the rules to be adopted by the Court.

(4) At the conclusion of the sentencing hearing, the Court is required to consider the matter in private deliberations to ensure a full and candid exchange of views. This is similar to the requirement contained in paragraph 6 of article 49 concerning the deliberations following the conclusion of the trial.

(5) The Court must impose sentences on convicted persons, in accordance with paragraph 1 of article 51. In performing this responsibility, it would be necessary for the Court to determine (1) the appropriate penalty or form of punishment to be imposed and (2) the degree of punishment commensurate with the crime in accordance with the general principle of proportionality.

(6) As regards the first question, the Court must consider the applicable penalties which the Court is authorized, in general, to impose with respect to the crimes referred to in the Statute and determine the appropriate form of punishment to be imposed in a particular case. For example, the Court may impose imprisonment or a fine but not the death penalty in accordance with article 53.

(7) In terms of the second question, the Court must determine the appropriate degree or severity of punishment to be imposed for the particular crime committed by the convicted person, having regard to both the crime and the individual, such as the length of imprisonment or the amount of the fine. The

obligation of the Court to consider any relevant aggravating or mitigating circumstances in determining the appropriate punishment is dealt with in article 54.

(8) The Court must announce its decision as to the appropriate punishment to be imposed on the convicted person in the form of a sentence, accompanying its judgment in the case, which must be announced in a public proceeding. The decisions of the Court regarding sentences are subject to appeal on the ground that there is a "manifest disproportion between the crime and the sentence", in accordance with article 55.

Article 53

Applicable penalties

1. The Chamber may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of imprisonment, up to and including life imprisonment;

(b) a fine of any amount.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed for a crime, the Chamber may have regard to the penalties provided for by the law of:

(a) the State of which the perpetrator of the crime is a national;

(b) the State on whose territory the crime was committed; or

(c) the State which had custody of and jurisdiction over the accused.

3. The Chamber may also order:

(a) the return to their rightful owners of any property or proceeds which were acquired by the convicted person in the course of committing the crime;

(b) the forfeiture of such property or proceeds, if the rightful owners cannot be traced.

4. Fines paid or proceeds of property confiscated pursuant to this article may be paid or transferred, by order of the Chamber, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State whose nationals were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

Commentary

(1) This article sets forth the applicable penalties which would be available to the Court in determining the appropriate punishment in a particular case, including a term of imprisonment up to and including life imprisonment and a fine of any amount. The Court would not be authorized to impose the death penalty.

(2) Whereas the term "sentence" connotes a term of imprisonment and the punishment imposed in a particular case, the term "penalty" is used as the generic term to encompass the various types of punishment which the Court may impose, including a fine or confiscation of property as well as imprisonment. For example, the national courts of some States are authorized, in general, to impose the death penalty in accordance with national law. The national courts may decide to apply such a penalty to a particular case by imposing the death sentence on the convicted person.

(3) In determining the term of imprisonment or the amount of fine to be imposed, the Court may consider the relevant provisions of the national law of the States which have a particular connection to the person or the crime committed, namely the State of which the convicted person is a national, the State on whose territory the crime was committed or the State which had custody of and jurisdiction over the accused. Although any State may prosecute a person for a crime under international law in accordance with the principle of universal jurisdiction, providing that the Court may consider the relevant national law of these three States is based on the particular connection between them and either the individual or the crime. The consideration of the laws of these States is even more appropriate with respect to the crimes under national law referred to in paragraph 2 (b) of article 26 of this Statute. While the Court is free to consider the relevant national law of the States indicated in this article, it is not obliged to follow the law of any one of them.

(4) In addition to imprisonment or fines, the Court may also order the confiscation of property unlawfully obtained or the proceeds of unlawful conduct. The Court may further order the return of such property to its rightful owner and the payment of fines or illicit proceeds to the Registrar

to defray the costs of the trial, to the State whose nationals were the victims of the crime for purposes of compensation, or to a fund to be established by the Secretary-General of the United Nations to benefit victims of crime. In this connection, attention may be drawn to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which contains detailed provisions concerning the confiscation of illicit proceeds, and the Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the proceeds of crime.

(5) Some members questioned the ability of the Court to determine the ownership of stolen property in the absence of a claim filed by the alleged owner, which may need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the Court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the Court to consider such matters would be inconsistent with its primary function and contrary to its fundamental purpose, namely to prosecute and punish without delay perpetrators of the crimes referred to in the Statute. However, other members felt that the Court should have the additional authority to provide reparation to the victims of the crimes referred to in the Statute.

Article 54

Aggravating or mitigating factors

In imposing sentence, the Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Commentary

(1) In determining the punishment to be imposed on the convicted person in the form of a sentence in a particular case, the Court must take into account all of the elements relating to the gravity of the crime committed, on the one hand, and the individual circumstances of the convicted person which may constitute mitigating factors, on the other. For example, the Court may decide to impose a lesser sentence for a war crime committed by a very young inexperienced member of the armed forces in comparison to the sentence imposed for the same crime committed by a senior military officer with years of

training and experience. In this connection, some members suggested that the gravity of the crime could also constitute a mitigating factor in a particular case because some crimes were less serious than others.

(2) The Court must also take into account the extent to which any sentence imposed by another court on the same person for the same acts has already been served, in accordance with paragraph 3 of article 45.

## PART 5. APPEAL AND REVIEW

### Article 55

### Appeal against judgment or sentence

1. [The Prosecutor and] the convicted person may, in accordance with the rules, appeal against a decision under articles 51, 52 or 53 on any of the following grounds:

(a) material error of law;

(b) error of fact which may occasion a miscarriage of justice; or

(c) manifest disproportion between the crime and the sentence.

2. Unless the Chamber otherwise orders, a convicted person shall remain in custody pending an appeal, and provisional measures may be taken to ensure that the judgment of the Chamber, if affirmed, can be promptly enforced.

#### Commentary

(1) The Nuremberg Charter provided that the decisions of the Tribunal were final and not subject to review, in accordance with article 26 thereof. However, the Working Group felt that more recent developments militated in favour of providing for the right of appeal. The United Nations Covenant on Civil and Political Rights in paragraph 5 of article 14 states as follows: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Furthermore, this right is provided for in article 25 of the Statute of the International Tribunal for the former Yugoslavia.

(2) The convicted person may appeal: (1) the judgment, on the grounds that it is based on a material error of law or an error of fact which may occasion a miscarriage of justice; or (2) a sentence, on the grounds that the sentence is manifestly disproportionate to the crime. The notion of material error of

law would include errors both of substantive law and of criminal procedure, and in both cases the error would have to be of such gravity as to invalidate the judgment.

(3) Consideration was also given to allowing the Prosecutor to appeal a decision on the same grounds. Members supporting this position invoked similar solutions in some systems of national law as well as the fact that the Prosecutor represented the interests of society as a whole. Some members, however, expressed concern about allowing the Prosecutor to appeal a decision of the Court, notably an acquittal, except in very limited circumstances and possibly at an earlier stage of the proceedings when the Court might decide to dismiss the case based on insufficient evidence before reaching a judgment on the merits. This is why the words "The Prosecutor and" appear between brackets in the text. One member believed that in such cases the Appeals Chamber should either deny the appeal or remand the case to a Chamber for further action, to the extent that such action would be consistent with the principle non bis in idem. The Working Group, noting that the extent to which the prosecution could bring an appeal varied in different legal systems, decided to return to the question of distinguishing between the right of the defence and the right of the prosecution to appeal a decision of the Court, with a possible view to limiting the latter.

(4) A person who has been convicted of a crime must remain in custody while the appeal is pending, unless the Chamber decides otherwise. Provisional measures may be taken while the appeal is being considered to facilitate the prompt enforcement of the judgment and sentence of the Chamber in the event that the decision of the Appeals Chamber is affirmative. The Working Group decided to return to the question of time limits for filing an appeal.

Article 56

Proceedings on appeal

1. As soon as notice of appeal has been filed, the Bureau shall take steps in accordance with the rules to constitute an Appeals Chamber consisting of seven judges who did not take part in the judgment contested.

2. The President or a Vice-President shall preside over an Appeals Chamber.

3. The Appeals Chamber has all the powers of the Chamber, and may affirm, reverse or amend the decision which is the subject of the appeal.

4. The decisions of the Appeals Chamber shall be by majority, and shall be given in open court. Six judges shall constitute a quorum.

5. Subject to article 57, decisions of the Appeals Chamber shall be final.

Commentary

(1) The Bureau must establish an Appeals Chamber consisting of seven judges who did not participate in the consideration of the case by the Chamber, in accordance with the rules of the Court, as soon as the notice of appeal has been filed with the Registrar. One member was opposed to conferring the power of appointment on the members of the Bureau for the same reasons expressed with respect to article 37.

(2) The Appeals Chamber, as the higher chamber, would have all the powers of the Chamber, as provided in this Statute, and would also have the power to affirm, reverse or revise the decision of the lower court.

(3) The Appeals Chamber would decide the issues raised in the appeal based on the opinion of a majority of the judges. The decisions would be delivered at a public proceeding and would be final, subject to the possibility of revision under article 57.

(4) The Statute does not expressly provide for dissenting or separate opinions to the decisions of the Appeals Chamber. While some members felt that dissenting or separate opinions should not be allowed for the reasons expressed in connection with article 51, other members considered such opinions essential with respect to appellate decisions which deal with important questions of substantive and procedural law. The Working Group agreed to return to this matter.

(5) Some members believed that there should be a separate and distinct Appeals Chamber, such as the one provided for in article 11 of the Statute of the International Tribunal for the former Yugoslavia. This would be consistent with the principle of the double degree of jurisdiction under which judges of the same rank did not review each others' decisions to avoid undermining the integrity of the appeals process as a result of the judges' hesitancy to reverse decisions to avoid the future reversal of their own decisions. However, others were of the opinion that the limited structure of the Tribunal may not be conducive to reserving a number of judges to sit in an appeals chamber since that would severely limit the number of judges available for the trial chambers. Another alternative would be to have appeals heard by all of the judges of the Court meeting in plenary, except those who participated in the lower court decision. While some members felt that the

appellate jurisdiction must as a matter of principle be exercised by a separate and distinct higher court, others felt that it would be sufficient to establish a higher chamber within the hierarchy of the Tribunal which would be the highest jurisdiction with competence in international criminal law comprised of the world's most eminent jurists.

(6) The Working Group invited the Commission and the General Assembly to comment on the questions raised in connection with article 56.

Article 57

Revision

The convicted person [or the Prosecutor] may, in accordance with the rules of the Court, apply to the Court for revision of its judgment on the ground that a new fact, not known at the time of the trial or at the time of the appeal, which could have been a decisive factor in the judgment of the Court, has since then been discovered.

Commentary

(1) A person convicted of a crime may, in accordance with the rules to be adopted by the Court, apply for revision of a judgment on the ground that a new fact, which was not known at the time of the trial or appeal and which could have been a decisive factor in the judgment, has since been discovered. The Working Group considered that while appeals should be heard by a different chamber, revisions should be heard by the same chamber that issued the earlier decision. It was felt that such a chamber would be i the best position to determine whether the decision should be revised in the light of the newly discovered fact.

(2) The words "or the Prosecutor" appear between brackets for reasons similar to those expressed in connection with the bracketed language in article 55. The Working Group decided to return to the question of the role of the prosecution in appeal and revision proceedings, bearing in mind the fact that different as well as similar considerations may be relevant with respect to the two types of post-trial proceedings.

PART 6. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 58

International cooperation and judicial assistance

1. States parties shall cooperate with the Tribunal in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction.

2. States parties which have accepted the jurisdiction of the Court with respect to a particular crime shall respond without undue delay to any request for international judicial assistance or an order issued by the Court with respect to that crime, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender of the accused to the Tribunal, in accordance with article 63.

(f) any other request that may facilitate the administration of justice, including provisions on interim measures as required.

Commentary

(1) The effective functioning of the Tribunal would be dependent upon the international cooperation and judicial assistance of States. States parties to the Statute would have an obligation to cooperate with criminal investigations conducted by the Prosecutor and to respond without undue delay to any request or order of the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents, the arrest or detention of persons, or the surrender of the accused.

(2) This article is similar to article 29 of the Statute of the International Tribunal for the former Yugoslavia. Whereas all States would have an obligation to cooperate with the International Tribunal established by the Security Council under Chapter VII of the Charter, paragraph 1 of the present article recognizes the general obligation of all States parties to the Statute to cooperate with and provide judicial assistance to the Tribunal. States parties which have also accepted the jurisdiction of the Court with respect to the particular crime would be required to respond without undue delay to a request or order issued by the Court with respect to measures such as those listed in paragraph 2. In connection with this article, the Working Group also took account of the Model Treaty on Mutual Assistance in Criminal Matters adopted by the General Assembly in resolution 45/117.

Article 59

Cooperation with States non-parties to the Statute

States non-parties to the present Statute may provide the Tribunal with judicial assistance and cooperation under articles 58 (2) or 62 on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Commentary

This article recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes referred to in the Statute. Thus, even those States which are not parties to the Statute are encouraged to cooperate with and to provide assistance to the Tribunal on the basis of comity, a unilateral declaration which may be general or specific in character, an ad hoc arrangement for a particular case or any other type of agreement between the State and the Tribunal.

Article 60

Consultation

The States parties shall consult promptly, at the request of any one of them, concerning the application or the carrying out of the provisions on international cooperation and judicial assistance, either generally or in relation to a particular case.

Commentary

States parties are required to consult promptly at the request of any one of them concerning the application or implementation of the provisions on international cooperation and judicial assistance, either with respect to a particular case or a general matter concerning the Tribunal. This is intended to avoid undue delays in the functioning of the Tribunal which may require the cooperation of a number of States to effectively perform its functions either in a particular case or in general.

Article 61

Communications and contents of documentation

1. Communications in relation to this Statute shall normally be in writing and shall be between the competent national authority and the Registrar of the Court.

2. Whenever appropriate, communications may also be made through the International Criminal Police Organization (ICPO/INTERPOL), in conformity with arrangements which the Tribunal may make with this organization.

3. Documentation pertaining to international cooperation and judicial assistance shall include the following:

(a) the purpose of the request and a brief description of the assistance sought, including the basis and legal reasons for the request;

(b) information concerning the individual who is the subject of the request;

(c) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons for the request and the justification relied upon;

(d) description of the basic facts underlying the request; and

(e) information concerning the charges, accusations or conviction of the person who is the subject of the request.

4. All communications and requests shall be made in one of the working languages set forth in article 18 of the present Statute.

5. If the requested State considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

Commentary

(1) This article establishes the general rule that communications should normally be between the Registrar and the competent national authorities of the State concerned and should be in writing in one of the working languages of the Tribunal, namely English or French, as provided in article 18.

(2) It also recognizes the possibility of communications between the Tribunal and the International Criminal Police Organization, which may be particularly appropriate in connection with criminal investigations.

(3) Any request or order must be accompanied by a sufficient explanation of its purpose and legal basis as well as appropriate documentation, in accordance with paragraph 3 of this article. Upon receipt of such a communication, the State may ask the Tribunal to provide additional information required to respond to the request or comply with the order.

(4) This article is based on a similar provision contained in article 5 of the Model Treaty on Mutual Assistance in Criminal Matters.

Article 62

Provisional measures

In cases of urgency, the Court may request of the State concerned any or all of the following:

(a) to provisionally arrest the person sought for surrender;

(b) to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of this Statute; or

(c) to take as a matter of urgency all necessary measures to prevent the escape of a suspect, injury to or the intimidation of a witness, or the destruction of evidence.

Commentary

When circumstances so require, the Court may also request the State concerned to take provisional measures, including measures to prevent the accused from leaving its territory or the destruction of evidence located in its territory. In connection with this article, the Working Group considered article 9 of the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 as well as article 55 of the Proposal for an International War Crimes Tribunal for the Former Yugoslavia prepared under the auspices of the Conference on Security and Cooperation in Europe.

Article 63

Surrender of an accused person to the Tribunal

1. As soon as practicable after affirming the indictment under article 32, the Prosecutor shall seek from the Bureau or, if a Chamber has been constituted, from the Chamber, an order for the arrest and surrender of the accused.

2. The Registrar shall transmit the order to any State on whose territory the accused person may be found, and shall request the cooperation of that State in the arrest and surrender of the accused.

3. On receipt of a notice under paragraph (2):

(a) a State party which has accepted the jurisdiction of the Court with respect to the crime in question shall take immediate steps to arrest and surrender the accused person to the Court;

(b) a State party which is also a party to the treaty establishing the crime in question but which has not accepted the Court's jurisdiction over that crime shall arrest and, if it decides not to surrender the accused to the Tribunal, forthwith refer the matter to its competent authorities for the purpose of prosecution;

(c) in any other case, a State party shall consider whether it can, in accordance with its constitutional processes, take steps to arrest and surrender the accused person to the Tribunal.

4. The surrender of an accused person to the Tribunal constitutes, as between the States parties to this Statute, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case submitted to its competent authorities for the purpose of prosecution.

5. A State party should, as far as possible, give priority to a request under paragraph 2 over requests for extradition from other States.

6. A State party may delay complying with paragraph 3 if the accused is in its custody and is being prosecuted for a serious crime or is serving a sentence imposed by a court for a crime.

7. A State party may, within 45 days of receiving an order under paragraph 2, file a written application with the Registrar requesting the Court to set aside the order or quash the indictment on specified grounds. Pending a decision of the Chamber on the application, the State concerned shall take all necessary provisional measures under article 62.

Commentary

(1) The Bureau or a Chamber, acting on behalf of the Court, would issue an order at the request of the Prosecutor for the arrest and surrender of the accused once the indictment has been affirmed. The order would be transmitted by the Registrar to any State on whose territory the accused may be found.

(2) The term "surrender" was considered to be broad enough to cover situations in which the accused is to be arrested and delivered to the Tribunal for trial, as well as situations in which the person is already in custody and is to be transferred to the Tribunal for trial. With respect to the latter situation, the person may have already been arrested and be awaiting trial for criminal charges under national law or may have already been convicted for such a crime and be serving a term of imprisonment. The trial of such a person by the Tribunal would be subject to the principle non bis in idem which may apply in accordance with article 45.

(3) Paragraph 3 of this article provides for the surrender of an accused person by a State in three different situations, as follows: (a) a State party

which has accepted the jurisdiction of the Court with respect to the crime in question must take immediate steps to arrest and surrender the accused person to the Court; (b) a State party which is also a party to the relevant treaty defining the crime in question but has not accepted the Court's jurisdiction must arrest and either surrender or prosecute the accused; and (c) a State party which is not a party to the relevant treaty must consider whether its internal law permits the arrest and surrender of the accused.

(4) A State party should, to the extent possible, give priority to requests from the Tribunal for the surrender of an accused over extradition requests from other States, according to paragraph 5 of this article. However, only a State party which has accepted the jurisdiction of the Court with respect to the particular crime would be obliged to do so under paragraph 3 (a). Other States parties would be required to prosecute the accused if they decided not to surrender the person for trial by the Tribunal. The Working Group decided to return to the question of whether such a State should also be allowed to extradite the accused to another State for prosecution rather than surrendering the person to the Tribunal.

(5) The surrender of a person to the Tribunal would constitute sufficient compliance with any treaty obligation to prosecute or extradite a person suspected of committing a crime referred to in the treaty, as between the States parties to the Statute. One member queried whether the phrase "as far as possible" in paragraph 5 of this article would adequately cover situations in which a State party requested and obliged to surrender the accused to the Tribunal under paragraph 3 (a) was subject to a preexisting treaty obligation to extradite to a State which was not a party to the Statute. In this connection, attention may be drawn to the Vienna Convention on the Law of Treaties.

(6) This article, as presently drafted, did not envisage the suspension of criminal proceedings in a national court to allow a person to be transferred to the Tribunal for trial or the transfer of any such proceedings to the Tribunal, although the proceedings may relate to acts constituting crimes referred to in this statute. Paragraph 6 provides that a State party may delay complying with a request for a person who is being prosecuted for a serious crime or is serving a sentence imposed by a court for a crime, in contrast with a person who is arbitrarily detained or whose presence is not required in connection with the administration of criminal justice in that

State. As regards the former situation, the present statute differed from the Statute of the International Tribunal for the former Yugoslavia which established the primacy of the International Tribunal over the national courts and provided that a State may be requested to defer to the competence of the International Tribunal with respect to a particular individual.

(7) A State party which receives an order pursuant to this article may request that it be set aside and challenge the indictment on specified grounds, possibly relating to the jurisdiction of the Court or the factual basis for the indictment. As discussed in connection with article 38, the Working Group will consider at a later stage the appropriate judicial organ for deciding such matters.

Article 64

Rule of speciality

1. A person delivered to the Tribunal shall not be subject to prosecution or punishment for any crime other than that for which the person was surrendered.

2. Evidence tendered shall not be used as evidence for any purpose other than that for which it was tendered.

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

Commentary

(1) This provision sets forth the rule of speciality under which a person delivered to another jurisdiction can only be prosecuted or punished for the crime indicated in the initial request, according to paragraph 1.

(2) Similarly, evidence tendered to another jurisdiction can only be used as evidence for the purpose stated in the original request, according to paragraph 2. The Working Group felt that a distinction should be drawn between the use of evidence as a source of information which may lead to the investigation of the same person for other crimes or the investigation of other persons who may have been involved in related criminal activity. Thus, the limitation on the use of evidence provided by States applies to its specific use as evidence in a criminal proceeding rather than for other purposes, such as information leading to other investigations or possibly the impeachment of a witness. In this connection, attention may be drawn to the Model Treaty on Mutual Assistance in Criminal Matters which recognizes that

States may not wish to limit the use of information received with respect to all crimes, but rather to restrict this limitation to fiscal crimes.

(3) The Court may request the State concerned to waive such limitations with respect to either persons or evidence, as provided in paragraph 3.

(4) The Working Group considered article 14 of the Model Treaty on Extradition concerning the rule of speciality in connection with paragraph 1 and it took into account article 8 of the Model Treaty on Mutual Assistance in Criminal Matters concerning limitations on the use of evidence.

## PART 7. ENFORCEMENT OF SENTENCES

### Article 65

### Recognition of judgments

States parties undertake to recognize and give effect to the judgments of the Court. Where necessary or appropriate, States parties shall enact specific legislative and administrative measures necessary to comply with the obligation to recognize the judgments of the Court.

### Commentary

States parties to the Statute must recognize and give effect to judgments of the Court and, where necessary, enact the national legislative and administrative measures required to do so, in accordance with article 65. This article recognizes that, as a general rule, States will not enforce the criminal or penal judgments of other States in the absence of a treaty. In this regard, attention may be drawn to paragraph 3 (b) of article 1 of the Model Treaty on Mutual Assistance in Criminal Matters and the Optional Protocol thereto concerning the proceeds of crime, as well as the European Convention on the International Validity of Criminal Judgments (1970 Eur.T.S. No. 70).

### Article 66

### Enforcement of sentences

1. States parties are requested to offer facilities for imprisonment in accordance with this Statute.

2. Imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Tribunal their willingness to accept convicted persons.

3. If no State is designated under paragraph 2, the imprisonment shall be served in a prison facility made available by the State referred to in article 3.

4. Imprisonment under paragraphs 2 or 3 shall be subject to the supervision of the Court.

Commentary

(1) The prison sentences imposed by the Court are to be served in the prison facilities of a State designated by the Court or, in the absence of such a designation, in the State where the Tribunal has its seat as provided for in article 3. Since the limited institutional structure of the Tribunal, as presently envisaged, would not include a prison facility, States parties would be requested to offer the use of such facilities to the Tribunal.

(2) There may be situations in which States parties are unwilling to make their prison facilities available to the Tribunal or the Court decides not to designate any of the States which are willing to do so. Thus, the Working Group felt that it was necessary to provide a residual rule to cover such situations, namely sentences are to be served in the prisons of the host country in the absence of the designation of another State. This is consistent with the special responsibilities encumbent on the State selected to serve as the seat of the Tribunal under article 3. The Working Group agreed to return to the factors to be considered by the Court in deciding whether to designate a State under paragraph 2, while recognizing that this matter may be more appropriately dealt with in the rules of the Court.

(3) While the prison facilities would continue to be administered by the national authorities, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners adopted under the auspices of the United Nations. The imprisonment of the convicted person would be subject to the supervision of the Court, the details of which may be elaborated in its rules. For example, the rules could establish the procedures under which a convicted person could seek redress for mistreatment or provide for periodic reports by the national authorities, taking into consideration the limited institutional structure of the Tribunal.

(4) In recognition of the substantial costs which may be involved in the incarceration of convicted persons for prolonged periods of time, as may be expected for the serious crimes referred to in this Statute which allows [illegible] of life imprisonment, it was suggested that all States parties

should share the burden of such costs as expenses of the Tribunal. The Working Group decided to return to the financial aspects of the Tribunal.

Article 67

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may, subject to and in accordance with the rules, apply to the Court seeking an order for pardon, parole or commutation of the sentence.

3. If the Bureau decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber to consider and decide whether in the interest of justice the person convicted should be released and on what basis.

4. When imposing sentence, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of the State which, under article 66, is responsible for implementing the sentence. In such a case the consent of the Court is not required for subsequent action of that State in conformity with those laws, but the Court shall be given at least 45 days notice of any decision which might materially affect the terms or extent of the imprisonment.

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Commentary

(1) The Working Group felt that the Statute should provide for the possibility of pardon, parole and commutation of sentence. Some members felt that such questions should be decided on the basis of a uniform standard, while other members felt that consideration must be given to the efficient administration of justice by the national authorities.

(2) This article provides that the State where the person is imprisoned must notify the Court if the person would be eligible for pardon, parole or commutation of sentence under the law of that State, in accordance with paragraph 1. Following a notification received under paragraph 1, the prisoner would apply to the Court for an order granting pardon, parole or commutation of the sentence. The Bureau would convene a Chamber to consider the matter if the application appeared to be well-founded.

(3) In imposing a sentence, the Court may also provide that the sentence is to be governed by specified laws as to these matters. In such cases, the Court must be notified prior to any decision that would materially affect the terms or extent of imprisonment, but the consent of the Court would not be required.

(4) Except as provided in this article, a person should not be released before the sentence imposed by the Court has been served.

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